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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 818

TRANSCONTINENTAL BUS SYSTEM, INC. ET AL,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TRANSCONTINENTAL BUS SYSTEM, INC. ET AL,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of

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[1] The Petitioners are: Adirondack Transit Lines, Inc., Atlantic Stages, Inc., Capitol Motor Lines, Capitol Bus Company, Inc., Carolina Coach Co., Carolina Scenic Stages, Coastal Stages Corp., Colonial Trailways, American Buslines, Inc., Arkansas Motor Coaches, Ltd., Continental Central Lines, Continental Crescent Lines, Continental Dixie Lines, Continental Eastern Trailways, Midwest Buslines, Inc., Continental Pacific Lines, Continental Panhandle Lines, Continental Rocky Mountain Lines, Continental

Appeals for the Fifth Circuit entered in Case No. 22791 *et al.*[2] on July 24, 1967.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 22791 is unreported. It is printed in Appendix A hereof (pp. 1a-44a, *infra*). The decision and opinion of Respondent Civil Aeronautics Board which was reviewed by the said United States Court of Appeals in Case No. 11791 *et al.* is designated Order No. E-22186, May 20, 1965 (Appendix B, pp. 45a-57a, *infra*).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 24, 1967. On October 13, 1967 Justice Hugo L. Black granted an extension of time to file this Petition until November 14, 1967. The jurisdiction of this court rests on 28 U.S.C. 1254.

Southern Lines, Continental Tennessee Lines, Continental Bus System, Inc., Union Bus Lines, Inc., Continental Western Lines, De Luxe Trailways, Inc., D.C.S.P. Motor Way, Inc., D.S.L.P. Stages, Inc., Western New York Motor Lines, Inc., Evergreen Trails, Inc., Georgia-Florida Coaches, Inc., Martz Coach Company, Ohio Trailways, Inc., Mt. Hood Stages, Inc., Queen City Coach Co., Safeway Trails, Inc., Service Coach Line, Inc., Smoky Mountain Stages, Indianapolis and Southeastern Trailways, Inc., Southern Stages, Inc., Tamiami Trail Tours, Inc., Tennessee Trailways, Trailways of New England, Inc., Transcontinental Bus System, Inc., Valley Transit Lines, Inc., Virginia State Lines, Inc., National Trailways Bus System and Southern Tier Trailways.

[2] Case Nos. 23020-23027, inclusive, 23054, 23099, 23512, 23513, 23410 and 23411 were consolidated with 22791. Petitioners are seeking a writ of certiorari in all of the consolidated cases except 23410 and 23411.

QUESTION PRESENTED

Whether airline passenger tariffs which offer half-fare air transportation to members of the armed forces on active duty but to no one else are unjustly discriminatory or unduly preferential and prejudicial in violation of Section 404(b) of the Federal Aviation Act of 1958, as amended.

STATUTES INVOLVED

Section 102 (72 Stat. 740, 49 U.S.C. 1302), Section 403(b) (72 Stat. 758, 49 U.S.C. 1373(b)), Section 404(b) (72 Stat. 760, 49 U.S.C. 1374(b)), and Section 1002 (72 Stat. 788, 49 U.S.C. 1482) of the Federal Aviation Act of 1958, are summarized in pertinent part in the Statement, p. 3 *et seq., infra,* and are set out in full in Appendix C, p. 58a *et seq., infra.*

STATEMENT

Air fare discounts for military personnel travelling at their own expense were first authorized by the Civil Aeronautics Board ("the Board") in 1956 when Part 227 of the Economic Regulations was promulgated.[3] It provided for discounts to servicemen travelling in overseas transportation between the then territories of Alaska and Hawaii, on the one hand, and the forty-eight states and the District of Columbia, on the other. This rule was issued pursuant to Section 403(b) of the Civil Aeronautics Act of 1938, as amended,[4] which in pertinent part provides:

> ". . . Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms

[3] 21 Fed. Reg. 264-65, January 13, 1956.

[4] Re-enacted as Section 403(b) of the Federal Aviation Act of 1958. (72 Stat. 758, 49 U.S.C. 1373(b)).

> and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation . . . in the case of overseas or foreign air transportation to such . . . persons and under such . . . circumstances as the Board may by regulations prescribe . . ."[5]

After Alaska and Hawaii became states, air transportation between these areas and the other states constituted interstate rather than overseas transportation as defined by the Federal Aviation Act of 1958, as amended (the "Act").[6] Therefore, the Board no longer possessed authority under Section 403(b) to permit reduced rates for servicemen. It advised the Senate that it required specific authority by amendment of Section 403(b) to continue the practice of permitting carriers to offer servicemen reduced-rate transportation between Alaska and Hawaii and the other states.[7] The Board also urged that the requested amendment be sufficiently broad to authorize transportation of servicemen on leave or furlough at reduced rates between any points in all fifty states.[8] The Senate adopted this proposal in part by amending a pending bill which provided for reduced-rate transportation for other classes of persons. However, the Senate amendment limited the scope of reduced rates for servicemen to

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[5] The full text of Section 403(b) is set forth in Appendix C, pp. 59a-60a, *infra*.

[6] Section 101 (21), 72 Stat. 737, 49 U.S.C. 1301 (Appendix C, p. 63a, *infra*).

[7] Hearings before the Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., pp. 3, 10-11, 20.

[8] *Ibid.*

air travel between Alaska and Hawaii, on the one hand, and the other forty-eight states, on the other.[9] This proposed amendment was deleted from the final bill by a conference committee at the insistence of the House of Representatives.[10] Thereafter, all outstanding tariffs providing discounts for servicemen travelling at their own expense were cancelled.

Three years later, in 1963, American Airlines published a military "standby" tariff which offered servicemen on furlough 50 percent discounts from regular coach fares when travelling subject to space availability. This tariff was applicable over American's entire interstate route network. Delta Air Lines and Northwest Airlines filed complaints requesting that the tariff be suspended and investigated by the Civil Aeronautics Board. Complainants maintained that reduced rates for servicemen were unjustly discriminatory and unduly preferential and prejudicial under Section 404(b) of the Federal Aviation Act of 1958, as amended.[11] They urged that servicemen were not exempt from the proscriptions of Section 404(b) by Section 403(b) as were a limited number of classes

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[9] Senate Report No. 1281, 86th Cong., 2d Sess., p. 3.

[10] 106 Cong. Record pp. 14770-14771 (June 29, 1960).

[11] "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 404(b) (72 Stat. 760, 49 U.S.C. 1374(b)).

of traffic,[12] and, therefore, the military "standby" tariff was illegal. Complainants also contended that the proposed 50 percent discount was unreasonable from a value of service and cost standpoint, and would prove uneconomic.

American Airlines responded to the complaints pointing out that military furlough traffic was principally transported by surface carriers and that the proposed tariff could make substantial inroads into thta traffic. It estimated the potential air travel market at $200,000,000 annually.

The Civil Aeronautics Board dismissed the complaints (Order E-19376, March 14, 1963). It found

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[12] In pertinent part, Section 403(b) (74 Stat. 445, 49 U.S.C. 1373(b)) reads as follows: ". . . . Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or pasess for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of person injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe may grant reduced-rate transportation to ministers of religion on a space-available basis."

that the standby character of the proposal distinguished it from regular fare service, particularly as passengers availing themselves of the discount fare could be off-loaded at intermediate points to provide space for full fare passengers. The Board recognized that the tariff was "inherently discriminatory" because its availability was restricted to servicemen. But it concluded that the discrimination was justified because of the national defense interest in promoting military morale, and the economic benefit accruing to the air carriers from being granted the opportunity to compete more effectively with surface carriers for military furlough traffic.

Virtually all certificated air carriers adopted American's military standby tariff in one form or another. Gradually the applicability of these fares was broadened. Military standby passengers were permitted to be carried in the first-class compartment of all aircraft when the coach compartment was fully occupied. The special discount was also made available to servicemen traveling on permanent change of station, or within seven days after discharge from the armed services, irrespective of whether they received a transportation allowance from the government for their travel. In some instances, the tariffs granted free baggage allowances greater than those available to civilian passengers paying first class fares.[18]

These tariffs were at first regarded as experimental. Generally, they were due to expire during the early months of 1965. Allegheny Airlines, a subsidized local service carrier, requested the first extension. Its proposal bore no expiration date. Petitioners filed a

[18] Sixty-six pounds for servicemen traveling on permanent change of station; forty pounds for first-class passengers.

complaint requesting suspension and investigation of that tariff (R. 1). The complaint alleged that the discount military standby fares had diverted traffic and revenue from complainants' bus services, and would continue to do so in the future. It maintained that these reduced fares represented illegal, unjust discrimination under Section 404(b) of the Federal Aviation Act of 1958 because they were based solely upon the identity and mission of a class of travelers upon which class Section 403(b) of the Act did not confer preferential rate treatment. Petitioners contended that such preferential treatment was unlawful absent specific Congressional authorization in Section 403(b), and that Allegheny's tariff was unduly preferential and prejudicial, unreasonable, unjust, and otherwise unlawful under Sections 102, 403(b) and 404(b) of the Act.

The Board refused to suspend Allegheny's tariff (R. 43). It regarded the power to suspend as useful principally in maintaining the status quo while a tariff was being investigated in a formal proceeding. As Allegheny's military standby tariff had been in effect for some time, the Board did not consider suspension appropriate. It deferred decision on whether to institute an investigation.

Shortly thereafter, nineteen other air carriers sought extensions of their military standby tariffs. Petitioners filed complaints against all of these proposals. (R. 63-107, 135-173, 197-241, 277-334, 358-409, 497-554). The Board dismissed all of the complaints (R. 258; Appendix B, p. 45a, *infra*). It found that the standby fares had proved economically beneficial to the airline industry and valuable as tools in competing with surface transportation, as well as helpful to the morale

of the armed services. These considerations, in the Board's judgment, sufficiently mitigated the discriminatory character of the tariffs to remove them from the area of forbidden, unjustly discriminatory fares. It also found that the standby nature of the service distinguished it sufficiently from regular fare service to avoid any unjust discrimination or undue prejudice against regular fare passengers[14] (Appendix B, p. 51a, *infra.*)

Petitioners requested judicial review of the Board's orders denying suspension and investigation in eleven United States Courts of Appeals. Jurisdiction of these courts rested on Section 1006 of the Federal Aviation Act of 1958, as amended (72 Stat. 795, 49 U.S.C. 1486). These cases were consolidated for decision in the Court of Appeals for the Fifth Circuit (Case No. 22971, *et al.*)

That court also consolidated Petitioners' request for review of the Board's refusal to investigate discount air fares for "youths" between 12 and 22 years of age. These latter fares were the subject of separate complaints filed with the Civil Aeronautics Board and were also before the Court of Appeals for the Fifth Circuit on separate petitions for review.

The court affirmed the Board's dismissal of Petitioners' complaints against the military standby fares, and reversed and remanded its dismissal of Petitioners' complaints against the "youth" fares for further proceedings (Case Nos. 23410, 23411). The court found that the Board did not abuse its discretion in

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[14] Since that ruling most airlines have published military furlough tariffs which permit advance reservations. These tariffs provide for fare discounts ranging from 33⅓% to 50% of the applicable coach fares.

finding that the military standby fares were not unjustly discriminatory, because the circumstances and conditions surrounding the transportation of military standby traffic were substantially dissimilar from those obtaining in the case of nonmilitary traffic to which the reduced standby fares were not available. The dissimilar conditions and circumstances were found to be (1) competition, i.e., the need to compete with surface carriers for military business; and (2) considerations of national defense, i.e., reduced rates to servicemen traveling on furlough or leave enable them to spend less time in transit, thereby increasing the morale of the armed forces and contributing to the national defense (Appendix A, p. 36a, *infra*). The court cited no judicial precedent in support of this conclusion.[15] In the case of the "youth" fares, the court found that the promotional and social policy factors which the Board cited in justifying their discriminatory aspects were not appropriate considerations under Section 102 of the Act.

On the issue of reasonableness of the discount, the court affirmed the Board.[16] It accepted the Board's finding that military standby traffic used otherwise unoccupied seats and that the air carriers were not scheduling service to accommodate this traffic. Accordingly, it held that the Board's conclusion that these fares were compensatory and, therefore, reasonable, did not constitute an abuse of discretion (Appendix A, pp. 43a-44a, *infra*).

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[15] The competitive and national defense considerations were cited by the court as proper factors under Section 102 of the Federal Aviation Act in testing fares alleged to be unjustly discriminatory under Section 404(b).

[16] It did not reach that issue in the youth fare cases.

REASONS FOR GRANTING THE WRIT

I

The important question before this Court is whether the "rule of equality" in ratemaking is to prevail in the regulation of air transportation as it has in the related area of surface transportation. The need for equality prompted enactment of the Interstate Commerce Act of 1887.[17] *New York, N.H. & H.R.R.* v. *Interstate Commerce Commission,* 200 U.S. 361, 391-92, 50 L. ed. 515, 521 (1906). The rule, as embodied in that statute requires equivalent rates where: (1) the services are like and contemporaneous; (2) the traffic is similar; and (3) the circumstances and conditions under which the services are rendered are similar. *Wight* v. *United States,* 167 U.S. 512, 42 L. ed. 258 (1897); *Interstate Commerce Commission* v. *Delaware L.W.R.R.,* 220 U.S. 235, 55 L. ed. 448 (1911).

This Court has insisted that common carriers offer equal rates and equal services to all persons irrespective of age, mission, business or status. *Wight* v. *United States, supra; Interstate Commerce Commission* v. *Alabama Midland Railway Co.,* 168 U.S. 144, 168, 42 L. ed. 414, 423 (1897); *Interstate Commerce Commission* v. *Baltimore & Ohio R.R. Co.,* 225 U.S. 326, 342, 56 L. ed. 1107, 1112 (1912); *Louisville & Nashville R.R.* v. *United States,* 282 U.S. 740, 75 L. ed. 672 (1931); *Baltimore & Ohio R.R. Co.* v. *United States,* 305 U.S. 507, 83 L. ed. 318 (1938); *United States* v. *Chicago Heights Trucking Co.,* 310 U.S. 344, 84 L. ed. 1243 (1940); *American Trucking Association, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 387 U.S. 397 (1967). The issue is whether these precedents, governing seventy years of surface freight rate regula-

[17] 24 Stat. 379, 49 U.S.C. 1.

tion, should be applied to the regulation of air transportation passenger rates.

This Court has never passed upon a controversy involving the lawfulness of passenger fares offered by surface or air carriers. It has never had occasion to review any airline rates or charges. Indeed, during the thirty years since air transportation became subject to federal regulation, the United States Courts of Appeals have reviewed the legality of allegedly unjustly discriminatory airline rates in only one previous instance. *Flying Tiger Line, Inc.* v. *Civil Aeronautics Board,* 350 F. 2d 462 (D. C. Cir., 1965).

The national significance of the issue is directly tied to the emergence of air travel as the principal mode of domestic, common carrier transportation. During 1966, over 60 percent of domestic, inter-city revenue passenger miles were generated by air carriers.[18] A large portion of this air travel was performed at fares which were available only to particular classes of persons, e.g. servicemen, youths, families. Every certificated air carrier offers system-wide discount fares. Currently, over 150 discount tariffs are in effect. Each carrier publishes approximately 12 such tariffs applicable to all markets served.

These discounts are characterized by varying degrees of discrimination. For example, the family fares published by all carriers offer discounts to certain family members traveling together. A discount ranging from 25 percent to 50 percent, depending upon the

[18] Address by the Honorable Robert T. Murphy, Vice Chairman, Civil Aeronautics Board, before the National Airports Conference of the American Association of Airport Executives. Norman, Oklahoma, October 11, 1967.

carrier, is given to the wife when traveling with her husband.[19] If the couple is accompanied by a child 12 through 21 years of age, that child and all other children are charged 25 percent to 50 percent of the regular fare. The family fare discount is solely geared to the status of the traffic, a status wholly unrelated to any transportation considerations. Even within the immediate family discrimination is practiced, because the discounts are not available to siblings traveling together, or to children over 21 years old when traveling with parents. Another example of these discount fares is the "First Rider" tariff of Trans-Texas Airways, which offers passengers over 21 years old, who have never flown on a certificated air carrier, a round-trip between any two points on its system at a flat rate of $25.00.[20]

The Board has generally encouraged airlines to develop so-called promotional discounts on the theory that the improved carrier earnings realized therefrom contribute to the lowering, or at least the stabilization, of the average fare level for all passengers. Chairman Charles E. Murphy of the Civil Aeronautics Board testified on this theory as follows:[21]

Senator Monroney:

"Do you monitor the so-called promotional fares? . . ."

Mr. Charles Murphy:

"Senator, we do monitor them in this sense: that we have approved every one of them. At least we

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[19] Reuben H. Donnelley, *Official Airline Guide* (Quick Reference Edition).

[20] *Ibid.*

[21] Hearings before the Subcommittee of the Senate Committee on Appropriations, 90th Cong., 1st Sess. on H.R. 9960, pp. 886-887.

did not disapprove any of them, and we could have. We could have disapproved any of them. And we looked at all of them. I suppose I should say that by and large, not in every case, but by and large, we have encouraged the air carriers to experiment with these promotional fares. I am convinced in my own mind that it is possible for the basic fare to be lower because they have these promotional fares. If we do not have these promotional fares, instead of being able to reduce the basic fare for everybody, we would have to increase it for everybody. And for those who don't want to fool with the complications, they can always go and buy a regular fare ticket. . . ."

Senator Monroney:

"But the basic fares haven't been lowered, I don't think. You had a 10-percent surcharge that was put on when the jets came in because they thought jets would be expensive to operate. They proved to be less expensive to operate. They run at full capacity all the time. And it seems to me that the regular travelers are entitled to some consideration, and not have it on the gimmicks. We have got so many crazy rates that nobody can possibly take advantage of them. And there should be something to encourage the regular travelers who might use this vital means of transportation."

Mr. Charles Murphy:

"The basic fares have been lowered in some cases, but generally there has not been a great deal of that. That is certainly true. And I will agree, everyone at the Board will agree, that the regular traveler is entitled, I would say, to primary consideration. But I would say, again, that it seems to me, at least, that the regular traveler, although his fare has not been reduced, his fare is not as high as it would have to be if it were not for the fact that these promotional fares carry part of the

> cost. We do not have a staff study that supports the statement that I have just made. So far as I know, the staff wouldn't disagree with me; we just haven't had the opportunity to make a study to see whether it is true or not. I believe it is true. . . ."

Thus, the premise is that those who are denied equal treatment are advantaged by the preferences accorded others, because the former would be worse off if the preferred class did not exist.[22] On this basis, preferential discounts which profit the proponent carrier are not deemed by the Board unjustly discriminatory to the excluded class because they financially benefit that class.

This philosophy, in large part, underlay the Board's decision to approve without investigation the military discounts which are the subject of this Petition. The original proponent of these discounts, American Airlines, urged Board approval because the air carriers had historically participated only to a relatively small extent in military furlough traffic. It estimated the potential air travel market for military furlough traffic at $200,000,000 annually (Order E-19376, p. 2, March 14, 1963). The Board found that the ability of surface carriers to offer reduced rates to the military pursuant to specific statutory authority constituted a

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[22] This view appears to be at variance with the long-term historic trend. In 1957, the year prior to introduction of highly economic jet aircraft in domestic transportation, the average fare per revenue passenger mile was 5.29¢. In 1966, when the overwhelming volume of air service was performed with jets, the average fare was 5.83¢ per revenue passenger mile. This 10.2% increase in the fare level was experienced despite the existence of a large number and wide variety of discount fares in 1966. During the same span, expenses per available ton mile rose by only 1.7%. *C.A.B. Air Carrier Traffic Statistics; C.A.B. Air Carrier Financial Statistics.*

competitive factor which justified the discriminatory fare proposed by American Airlines (*Id.* at p. 3). This conclusion was affirmed by the court below (R. 123).

It is clear that the competitive concept which the Board employed to justify the inherently discriminatory military discounts is markedly different from the traditional concept. These discounts were not offered to protect the historic traffic of the airlines. To the contrary, they were offered to divert the historic traffic of the surface carriers.[23] The size of the discount confirms this objective. Whereas surface carrier military discounts had generally ranged between 10 percent and 15 percent of the regular fares (R. 16), the airlines were proposing 50 percent discounts. Consequently, the airline discounts were prompted by promotional aspirations rather than competitive necessities. This reality suggests that Board approval of the military discounts was motivated by the belief that discriminatory fares are justified where they are promotional and potentially profitable to the air carriers.

This approach points up the Board's need for guidance in the development of a rational fare policy consistent with sound ratemaking law. This court can provide that guidance by setting forth the standards which the Board must employ in determining whether discriminatory fares exceed the permissible bounds of the Federal Aviation Act.

II

The case at bar has great prospective importance. The court below affirmed the Board's reliance upon

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[23] In this connection, American Airlines argued that air carriers transported only 10% of military furlough traffic (R. 469).

competition as a justification for approving the military discount fares (Appendix A, p. 53a, *infra*). Under the competitive theory espoused by the Board, no potentially profitable fare discount, irrespective of its discriminatory characteristics, would be barred. For example, the youth fare discounts which the court below found unlawful (*Id.* at 48a-52a), might be subsequently justified by the same type of competitive theory which was applied to the military discounts. The court remanded to the Board its dismissal of Petitioners' complaints against the youth fare discounts (Appendix A, pp. 53a-54a, *infra*), because the Board attempted to justify the discriminatory discounts on the basis of broad social policies favoring youths and the promotional aspirations of the proponent airlines. Should the Board find competitive justifications for these discounts, as it did in the case of the military discounts, presumably it could continue their effectivness. The same rationale might sustain reduced fares for the elderly, an historically significant market for bus service.[24]

Thus, if the competitive justification for military discounts is to prevail, the airlines can, with the Board's encouragement, selectively divert those markets comprising the principal sources of Petitioners' passenger

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[24] Aloha Airlines and Hawaiian Airlines publish reduced fares for persons over 65 years of age traveling on a space available basis between points in Hawaii. Ozark Air Lines, Mohawk Airlines and Trans Caribbean Airways have published similar fares which were either suspended by the Board or withdrawn after an investigation was ordered by the Board. ***Mohawk Airlines Golden Age Excursion Tariff***, Order E-17111, July 6, 1961; ***Ozark Air Lines Senior Citizen Excursion Tariff*** (Order E-21973, March 31, 1965; ***Trans Caribbean Airways Individual Senior Citizens Excursion Tariff***, Order E-23370, March 19, 1966.

revenues. Of equal, if not greater importance, the public at large has a strong interest in this issue. Vice-Chairman Robert T. Murphy of the Civil Aeronautics Board expressed this interest in an opinion dissenting from approval of preferential fares to federal officials traveling by air on "government travel requests":

> ". . . At stake is the essence of the reasonableness and the justice of the basic rates and charges assessed against the general public whose interest we are specially obligated by statute to protect. Once established as a matter of exception to the general anti-discrimination provisions of the Act, it is difficult to perceive any sound method of containing the spread of discounted fares to other bulk users of air travel. As one complainant states: '. . . we cannot see any basis in logic or law upon which similar discounts could be denied to the numerous corporations and other concerns and organizations, including the United Nations, which have adopted *bona fide* policies identical to that cited by Frontier regarding the Federal Government.'[3] Hence, the problem raised by this special tariff transcends the narrow confines in which it is presented to us. It is particularly vexing for one who has long supported a policy of maintaining fair and reasonable rates for the general public, including Government agencies. Some might regard this proposal as merely highlighting the fact that the rates charged by local service carriers are not necessarily commensurate with the grade or quality of their particular

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[3] Complaint of Trans World Airlines, Inc., D. 16608, pp. 3-4.

service vis-a-vis the trunk carriers.[4] For present purposes it is not necessary to treat the matter in these terms. As I see it, continued discounts or reduced fares for special categories of bulk users of air travel, such as Federal Government employees and others, can ultimately lead to the unhappy day when only the lonely, the unorganized, or the disaffiliated will be saddled with a 'full' fare. In my view, the carriers should be encouraged to seek ways and means of achieving general across-the-board reductions benefitting the general public, including Government agencies, rather than pursue courses of action designed to grant special privilege to Government officials in the use of public facilities—a concept alien to our system of democratic self-government."

C.A.B. Order No. E-22929, November 24, 1965.

[4] For example, Western alleges: "Thus Frontier may be hinting that its Convair 580 service is in fact a coach service for which it should be permitted to charge a coach fare to passengers travelling on government transportation requests. If this be the case, the first class fares which Frontier charges the remainder of the traveling public for the same service are not only discriminatory, but are unreasonably high and thus unlawful." Complaint of Western Air Lines, Inc., D. 16597, pg. 2.

III

This case also presents an important issue of statutory interpretation, namely, the scope of Section 404(b) of the Federal Aviation Act and its relationship with Sections 102 and 403(b) of thta Act.[25] Section 404(b) sets forth the anti-discrimination provision of the statute as follows:

"No air carrier or foreign air carrier shall make, give or cause any undue or unreasonable preference

[25] The full text of these sections is quoted in Appendix C, p. 58a *et seq., infra.*

> or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This section expresses the Board's responsibility to observe the "rule of equality" in air transportation ratemaking. It was modeled after Section 2 of the Interstate Commerce Act (Appendix C, p. 67a, *infra*) and, accordingly, is to be interpreted in conformity with judicial decisions construing that section. *Interstate Commerce Commission* v. *Delaware L. & W. R.R. Co.*, 220 U.S. 235, 243, 55 L. ed. 448 (1911); *American Airlines* v. *North American Airlines, Inc.*, 351 U.S. 79, 82, 100 L. ed. 953, 960 (1956).

This court has consistently construed Section 2 of the Interstate Commerce Act as precluding discriminatory prices geared to the identity, mission or status of the preferred or prejudiced class of traffic. Thus, in *Wight* v. *United States*, 167 U.S. 512, 42 L. ed. 258 (1897), a lower rate to one shipper than to another for like and contemporaneous service was deemed unjustly discriminatory. *Interstate Commerce Commission* v. *Baltimore & Ohio R.R. Co.*, 220 U.S. 326, 56 L. ed. 1107 (1912), held that lower rail rates for coal used by railroads than for other coal transported under similar circumstances and conditions were unjustly discriminatory. The free carriage by a railroad of private cars for some persons and not for others was deemed unjustly discriminatory, *Louisville and Nashville R.R.* v. *United States*, 282 U.S. 740, 75 L. ed. 672 (1931), as was the provision of below cost warehousing

to some shippers and not to others, *Baltimore & Ohio R.R. Co.* v. *United States,* 305 U.S. 507, 83 L. ed. 318 (1938).[26]

All discriminatory ratemaking is not barred by Section 2 of the Interstate Commerce Act or by Section 404(b) of the Federal Aviation Act. Discriminatory rates specifically sanctioned by Congress pursuant to its sound appraisal of public needs are allowable. Section 22 of the Interstate Commerce Act[27] sets forth an extensive list of persons who Congress determined could qualify for preferential rates should surface carriers opt to offer them.[28] The Federal Aviation Act's counterpart is Section 403(b). That Section lists those persons and class of persons who are excepted from the "rule of equality" in that they may be offered free or reduced air transportation by virtue of their identity, mission or status.[29] These special categories are generally limited to persons connected with the air transportation industry. In this respect, Section 403(b) differs substantially from Section 22 of the Interstate Commerce Act which makes free or reduced transportation available to an extensive list of persons unconnected with the surface

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[26] To some effect see *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 84 L. ed. 1243 (1940); *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 91 L. ed. 1102 (1947).

[27] The text of Section 22 is set forth in Appendix C, pp. 67a-68a, *infra.*

[28] 25 Stat. 862 (as amended by 25 Stat. 862, 28 Stat. 643, 83 Stat. 827, 44 Stat. 1247, 44 Stat. 1446, 48 Stat. 1264, 49 Stat. 543 50 Stat. 475, 50 Stat. 809, 54 Stat. 900, 901, 58 Stat. 751, 70 Stat. 702, 71 Stat. 564, 72 Stat. 1264), 49 U.S.C. 22.

[29] Section 403(b) is quoted in its entirety in Appendix C, pp. 59a-60a, *infra.*

transportation industry, *including servicemen traveling on furlough or leave.*

The Board has had occasion to note the distinction between Section 22 of the Interstate Commerce Act and Section 403(b) of the Civil Aeronautics Act [30] when it rejected a tariff which proposed reduced fares for students. It stated its view as follows:

> "The Congress, however, in writing the Civil Aeronautics Act showed no inclination to prefer students over the general public. The Interstate Commerce Act from which the Civil Aeronautics Act was derived, contains broad provisions in Section 1 (7) and 22 permitting free and reduced transportation to several categories of persons such as ministers of religion, inmates of hospitals and charitable or eleemosynary institutions, indigents and others.
>
> "In passing the Civil Aeronautics Act, the Congress in Section 403(b) which provides for free and reduced-rate transportation, substantially narrowed the categories to whom such transportation could be offered. Neither statute includes students in the categories to be provided such services and both the Interstate Commerce Commission and the Civil Aeronatuics Board have held that granting reduced-rate transportation to students is unjustly discriminatory." [Footnote omitted]. *Capital Group Student Fares,* 25 C.A.B. 280, 285 (1957).

The Board pinpointed the limits of Section 403(b) *In the Matter of an A.T.C.A. Resolution,* Order E-14349, August 17, 1959, stating:

> "It is worth noting that in the field of domestic air transportation, as distinct from overseas and

[30] Section 403(b) of the Civil Aeronautics Act of 1938 was reenacted without change as Section 403(b) of the Federal Aviation Act of 1958.

foreign air transportation, the Congress has not given the Board discretion with respect to the granting of free and reduced rate privileges. Thus, under the terms of Section 403(b), the Board has been given authority to authorize free and reduced rates for domestic, overseas and foreign air transportation for specified categories of persons and, with respect to overseas and foreign air transportation *alone* 'to such other persons and under such other circumstances as the Board may by regulation prescribe.' When it was determined that categories of persons not specifically named in Section 403(b) should be provided with reduced rate transportation domestically, it was deemed necessary to obtain statutory modification from the Congress. . . ."[31]

[2] Section 403(b) of the Act specifically authorizes the Board, by regulation, to permit free or reduced rate transportation to others than those enumerated in the Act with respect to overseas or foreign air transportation, but does not grant similar authority with respect to interstate air transportation. *Joint Application of Pan American World Airways and United Air Lines*, Order E-25757, September 29, 1967.

In 1959, the Board sought an amendment to Section 403(b) to authorize air carriers to offer servicemen free or reduced rates in interstate air transportation. The Board regarded such legislation as a condition precedent to the granting of preferential fares to

[31] As recently as September 29, 1967, after the decision of the Court of Appeals in this case, the Board again commented on the restrictive nature of Section 403(b) ". . . while as indicated in the joint application, free transportation could be provided to passengers participating in inaugural flights in overseas or foreign air transportation pursuant to the Board's regulations, these regulations reflect distinctions created in Section 403(b) of the Act,[2] and similar provision has not been made to permit free or reduced rate transportation in interestate air transportation . . .

servicemen.[32] The Senate also believed that the Board lacked power to authorize carriers to permit reduced rate transportation to servicemen traveling in interstate commerce.[33] However, the proposed legislation was rejected.

The court below did not regard this legislative history or the earlier pronouncements of the Board as determination of the issue of Board statutory authority. It looked to the "Declaration of Policy" of the Federal Aviation Act to ascertain whether the Board possessed the requisite power to permit reduced transportation for servicemen.

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[32] Hearings before the Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., pp. 3, 20.

[33] "In regard to amendment (4) above, the CAB specifically requested such addition to the bill for the purpose of allowing air carriers to offer reduced rates for furlough travel of military personnel stationed in the States of Alaska or Hawaii in accordance with a practice which the Board has permitted in the years prior to their admission to the Union. Specifically, the Board advised that when Alaska and Hawaii were Territories, air transportation between the States and Alaska or Hawaii was 'overseas air transportation' as defined in the Federal Aviation Act, and consequently, the Board had authority under existing law, to permit air carriers to grant reduced rates to military personnel traveling at their own expense on furlough between the States and these Territories. With their admission to the Union, such transportation can no longer be regarded as 'overseas air transportation' and authority to grant reduced rates under section 403(b) is lacking. 'Your committee adopted the recommendation of the Board but has limited the privilege to travel only between a place in Alaska or Hawaii on the one hand and a place in any of the other States, on the other hand. This amendment would not permit or authorize the carriage of military furlough traffic at reduced rates to or from any other place in the United States." Senate Report No. 1281, 86th Cong., 2d. Sess., p. 3; U. S. Code Congressional and Administrative News, 86th Cong., 2d. Sess., p. 3060.

The Declaration of Policy, in pertinent part, states:[34]

> "In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> "(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> * * *
>
> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> "(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;"
>
> * * *

The court concluded that the Board possessed the requisite authority under Section 102 of the Act where the grounds for granting reduced rates to servicemen were, first, the competition of reduced rate travel offered by surface carriers and, second, the national defense would be served by such reduced airline rates, in that the morale of the servicemen would be improved or sustained thereby. Thus, the court below imported the policy provisions of the Statute into the substantive provisions to arrive at the conclusion in issue here. This

[34] Section 102 of the Federal Aviation Act, as amended, (72 Stat. 740, 49 U.S.C. 1302).

conclusion appears to be in conflict with a line of Supreme Court cases.

Thus in *Civil Aeronautics Board* v. *Summerfield,* 347 U.S. 74, 98 L. ed. 513 (1954), this Court reversed a Board rate determination based upon Section 102 policy considerations. Justice Douglas, writing for a unanimous Court stated as follows:

> "It [the Board] maintains that maximum operating efficiency on the part of air carriers and the development of air transportation — prominent objectives of the Act [footnote quoting Section 102 of the Act omitted]—will be better served by setting subsidy rates on a divisional rather than on a system basis. But that is a matter of policy for Congress to decide. As we read Section 406(b) Congress adopted in the present Act a rate formula based on 'the need' of the carrier as measured by its entire operations, even when a rate was being fixed for a class of service."
>
> 347 U.S. 74, 79-80, 98 L. ed. 513, 519-520 (1954).

This Court has also ruled on the issue of whether competition or the needs of the national defense are appropriate considerations in determining the legality of allegedly unjustly discriminatory rates.

Since 1897, competition between carriers has not been regarded as a condition or circumstance justifying discriminatory rates. *Wight* v. *United States, supra; Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U.S. 144, 167-168, 12 L. ed. 414, 423 (1897); *Eastern-Central Motor Carriers Association* v. *United States,* 321 U.S. 194, 205-206, 88 L. ed. 668, 676-677 (1944). The only exception is where the regulatory agency is responsible for regulating competition

between modes of transportation subject to its jurisdiction. In such cases, the agencies responsibility to balance intermodal competition is paramount. *Eastern-Central Motor Carriers Association* v. *United States, supra; American Trucking Association* v. *Atchison, Topeka & Santa Fe R.R. Co., supra.*

The Civil Aeronautics Board, however, is limited to regulating the air transportation industry. In this connection, the statutory admonition that the Board consider as being in the public interest "competition to the extent necessary to assure the sound development of an air-transportation system . . ."[35] clearly relates to competition among air carriers, rather competition with surface carriers not subject to its regulation. To interpret this Section otherwise would impose upon the Board the positive responsibility to encourage competition between air carriers and surface carriers by means such as permitting discriminatory rate cutting practices, *inter alia.*

The alternative policy justification for the discriminatory fares at issue here, are the alleged needs of the national defense. Recently, this Court dealt directly with the question of whether the needs of the national defense are appropriate considerations in assessing the lawfulness of discriminatory rates under the Interstate Commerce Act. *Interstate Commerce Commission* v. *New York, N.H. & H.R.R. Co.*, 372 U.S. 744, 10 L.ed 2d, 108 (1963) It held that the Interstate Commerce Commission had the power in establishing rates to consider

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[35] Section 102(d) of the Federal Aviation Act of 1958, as amended. (72 Stat. 740, 49 U.S.C. 1302)

the needs of the national defense only under the most extraordinary circumstances, stating:

> "On the other hand, by recognizing the relevance of such considerations as national defense, we do not imply that these broad policy factors may be applied so freely as to nullify either the more particularized mandates of the National Transportation Policy or the clear congressional design embodied in Section 15a(3) Normally, it is these more specific considerations that should be given the lawfulness of proposed rates in a case involving intermodal competition. Only under extraordinary circumstances may the Commission properly permit them to be outweighed. To justify such a result, we believe it must be demonstrated that the proposed rates in themselves genuinely threaten the continued existence of transportation service that is uniquely capable of filling a transcendent national defense policy or other public need . . ."
>
> 372 U.S. 763-764, 10 L. ed. 2d 108 (1963).

This Court appears to have carved out a narrow exception to the rule that policy considerations may not be imported to overcome the specific statutory provisions governing ratemaking. That exception by its terms does not seem to apply to the instant case. However, to the extent that the *New York, New Haven & Hartford Case* is not regarded as limited to its particular factual context, it is in conflict with this Court's decision in *Civil Aeronautics Board* v. *Summerfield, supra.* The distinction between these cases should be affirmed or, if they are indistinguishable, the conflict should be resolved.

IV

This case also poses the increasingly important issue of the role of the regulatory agency vis-a-vis the Con-

gress. Petitioners do not question that the Civil Aeronautics Board has the power, indeed, the responsibility to formulate certain national air transportation policies. However, where the Congress has traditionally reserved to itself the determination of who may receive preferential fares or rates,[36] it does not appear appropriate for the Board to assume this power in an *ad hoc* situation, merely to meet the exigencies of the moment.

Petitioners do not question that the availability of air transportation to servicemen at a cost within their means contributes to morale. However, the weight to be accorded this consideration in establishing rates is a matter for Congress, as is the matter of whether official military travel should be accorded preferential rates in the interest of national defense. Congress has acted on both issues in the field of surface transportation, by amending Section 22 of the Interstate Commerce[37] Act to provide for reduced rates for

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[36] Every draft of the Civil Aeronautics Act contained rigid restrictions on the grant of free or reduced transportation. Hearings on Airline Pass Privileges before the House Subcommittee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., p. 17. The Senate expressed its views on the matter as follows: "Under law, air carriers are strictly prohibited from granting free or reduced-rate transportation to any person other than those listed in Section 403(b) of the Civil Aeronautics Act * * *." Senate Report No. 1585, 82d Cong., 2d Sess., p. 1. When reduced rate air transportation for the clergy was deemed desirable, the matter was submitted to Congress, which amended Section 403(b) of the Act to permit such reduced rates. Hearings on Airlines Fares for Ministers, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., pp. 2, 24 (April 20, 1956).

[37] Section 22 of the Interstate Commerce Act, 25 Stat. 862 (as amended by 25 Stat. 862, 28 Stat. 643, 43 Stat. 1264, 49 Stat. 543, 50 Stat. 475, 50 Stat. 809, 54 Stat. 900, 901, 58 Stat. 751, 70 Stat. 702, 71 Stat. 564, 72 Stat. 1264) 49 U.S.C. 22. The text of this Section is set forth in its entirety in Appendix C, pp. 67a-69a, *infra*.

official military travel, as well as for unofficial furlough travel by servicemen. It has not seen fit to do so heretofore in the field of air transportation.

The precise issue was focused upon recently in a legal periodical.[38] The author concluded as follows:

> "The article has focused primarily upon sections 404 and 403 in order to clarify the framework within which Congress intended the Board to operate in the exercise of its economic regulatory powers. Correct application of sections 404 and 403 will enable the CAB to comply with the congressional intent and to move away from its ad hoc decisions of late. The Board is without power to liberalize the Federal Aviation Act to suit transitory policies but, rather, is responsible for enforcement of the act in accord with congressional intent.
>
> "Public sentiment is quite naturally with the servicemen, but it was likewise with the clergy. Nevertheless, in the latter case the CAB enforced the act as written and the result was an amendment to section 403(b) permitting the clergy rate reductions. Therefore, it is submitted that Congress should authorize an amendment permitting military discounts on a standby basis in order to prevent the Board from compromising its statute in favor of public sentiment and promotion." *Id.* at p. 585.[39]

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[38] McGuire, *Federal Aviation Act—Interworkings of Section 403 and 404—Military Standby Fares.* 32 Journal of Air Law and Commerce, 571 (1966).

[39] This same view was expressed in *Ex Parte Koehler,* 31 F. 315 (Cir. Ct., D. Oregon, 1887), where the issue was whether railroad passes could lawfully be issued to the immediate families of railroad employees where Section 22 of the Interstate Commerce Act did not list such persons as entitled to free or reduced-rate transportation. The Circuit Court declared such passes to be violative

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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of the unjust discrimination provisions of that Act. It concluded: ". . . Doubtless it would be expedient to include the immediate family—the wife and minor children—of the employee in this exception. By this means the corporation might, without material cost to itself, or prejudice or injustice to any one, augment in a graceful way the compensation and convenience of faithful servants. But the remedy, if any, is with congress and not the courts." (*Id.*, at 321-322).

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 22791, 23020, 23021, 23022, 23023, 23024, 23025, 23026, 23027, 23054, 23099, 23512 and 23513.

TRANSCONTINENTAL BUS SYSTEM, INC., ET AL; TRAILWAYS OF NEW ENGLAND, INC.; CAPITOL BUS COMPANY, INC., ET AL; VIRGINIA STAGE LINES, INC., ET AL; CONTINENTAL TENNESSEE LINES, ET AL; DELUXE TRAILWAYS, INC., ET AL; AMERICAN BUSLINES, INC., ET AL; CONTINENTAL PACIFIC LINES, ET AL; D.C.S.P. MOTOR WAY, INC., ET AL; ADIRONDACK TRANSIT LINES, INC., ET AL; NATIONAL TRAILWAYS BUS SYSTEM,

Petitioners,

VERSUS

CIVIL AERONAUTICS BOARD,

Respondent.

No. 23410

TRANSCONTINENTAL BUS SYSTEM, INC.,

Petitioner,

VERSUS

CIVIL AERONAUTICS BOARD,

Respondent.

No. 23411

TRANSCONTINENTAL BUS SYSTEM, INC.,

Petitioner,

VERSUS

CIVIL AERONAUTICS BOARD,

Respondent.

Petitions for Review of Orders of the Civil Aeronautics Board.

(July 24, 1967.)

Before GEWIN, THORNBERRY and DYER, *Circuit Judges.*

GEWIN, *Circuit Judge:* These are consolidated petitions for review of several orders of the Civil Aeronautics Board (Board) dismissing without a hearing the petitioners' consolidated complaints which sought the suspension and investigation of tariffs filed by numerous air carriers providing for reduced rates for military standby, youth standby, and young adult passengers. The petitioners, forty-six independent motor carriers licensed by the Interstate Commerce Commission and a national trade association of motor bus operators, claimed that the tariffs were unreasonable, uneconomic, and unjustly discriminatory in violation of sections 403(b) and 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1373(b) and 1374(b) (1964). The Board found that the complaints failed to set forth sufficient facts to warrant suspension or investigation of the tariffs and, in accordance with § 1002 of the Act, 49 U.S.C. § 1482 (1964), dismissed the complaints without a hearing.

The petitioners sought review of the orders approving the military standby tariffs in the eleven Courts of Appeals. The petitions were transferred to this Court and consolidated with the petition filed in this Court, Case No. 22,791. Subsequently, the petitioners sought review of the orders approving the youth and young adult fares in this Court, and those petitions, Nos. 23,410 and 23,411, were also consolidated with Case No. 22,791 in this proceeding. We affirm the action of the Board with respect to the military standby tariff, but set aside the orders relating to the youth and young adult tariffs and remand for further proceedings.

The military standby tariff provides that military personnel traveling in uniform on leave, pass, or furlough or within seven days of discharge may fly on a standby basis

for approximately one-half of the regular jet coach fare.[1] The standby status permits the traveler to be accommodated only if seats are available after all regular fare passengers have been boarded and subjects him to being deplaned enroute or "bumped" to accommodate a regular fare passenger.[2]

The youth standby tariff similarly allows a rate reduction of fifty percent of the regular jet coach rate and provides carriage only after all regular fare and military standby passengers have been accommodated. Persons traveling under this tariff may also be "bumped" enroute. The reduced rates are available only to youths over the age of 12[3] and under the age of 22 who purchase an identification card issued annually by the airlines for the sum of $3.00. The reduced fares are unavailable during certain peak holiday periods, namely Easter, Thanksgiving, Christmas and New Years.[4]

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[1] In the case of local service carriers which offer only one class of service, the fare is one-half of the regular fare charged for that service, i.e. 50% of first class propeller service.

The tariff also provides that when traveling on a permanent change of station 66 pounds of baggage is permitted without a charge for over-weight as compared with 40 pounds for the regular first class passenger.

[2] The military standby tariff of Frontier Airlines, Inc. provides for transportation without the "bumping" limitation. Military personnel traveling subject to this tariff are guaranteed straight passage to their ticketed destination once enplaned.

[3] Children under the age of 2 years travel free and children between the ages of 2 and 12 travel at half fare if accompanied by an adult. A child between the ages of 2 and 12 traveling without an accompanying adult must pay the full regular fare. See Full Fare For Unaccompanied Children, 24 C.A.B. 408 (1956).

[4] The exact dates on which the reduced rates are unavailable varies with the individual air carrier involved. See Appendix B, C.A.B. Press Release, Jan. 20, 1967.

The young adult fare tariff, proposed only by Allegheny Airlines, Inc.[5] is also applicable only to persons between the ages of 12 and 22 who hold identification cards issued annually by the airline for the sum of $10.00. Cards procured after June 30, however, may be purchased for $5.00. This tariff provides for the making of reservations and the rates are two-thirds of the regular first class fare.

To more fully understand the nature of these proceedings a short history of reduced fares for military personnel and youths is required. The Board first sanctioned reduced fares for military personnel traveling at their own expense in 1956. Those tariffs provided for reduced fares on flights between the continental United States and the then territories of Alaska and Hawaii. These rates were authorized under Board regulations issued pursuant to the provision of § 403(b) which excises overseas and foreign tariffs from the strictures of that section and relegates control of such traffic to the Board. When the territories became states, however, travel between them and the continental United States was no longer overseas transportation and the rates were abandoned. The present military standby tariffs here under consideration were first submitted in essentially their present form and were authorized by the Board on a temporary basis in 1963. See *American Airlines Military Fares,* 38 C.A.B. 1038 (1963). Those tariffs provided for a fifty percent reduction in jet coach rates and applied to military personnel traveling in uniform on furlough, leave, or pass. Carriage under the tariff was on a standby basis, and passengers were to be accommodated only in empty coach seats. The expiration dates for those tariffs were set in early 1965. Subsequent extensions expanded the service to its present state. The complaints of the petitioners in the instant proceeding were directed at tariffs filed by twenty air carriers

[5] A substantially similar tariff filed by Delta Air Lines, Inc. was approved by the Board on May 9, 1966. See Order No. E-23656. The propriety of that order, however, is not before us.

proposing an indefinite extension of the military standby tariff.

Reduced rates for youths under twelve have traditionally been a part of the rate scheme in the transportation industry. In 1961 the Board first approved reduced fares [6] for youths between the ages of 12 and 22 as a promotional experiment. Those tariffs provided for a fifty percent reduction in fare and permitted the making of reservations within three hours of flight time. Shortly after the tariffs went into effect they were abandoned by the trunkline air carriers because of operating difficulties caused by the tariffs. Several local service carriers, however, continued the reduced rates, and they are still in effect today.[7] In December 1965, American Airlines, Inc. filed the youth standby tariff here in question. On the same day, Allegheny Airlines filed its young adult tariff, Neither tariff contained an expiration date. Complaints were filed against the youth tariff of American by five competing airlines,[8] the American Society of Travel Agents, and the petitioners. Only the petitioners filed a complaint against Allegheny's young adult tariff. The complaints in both cases sought suspension and investigation of the tariffs.

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[6] Youth Fares Proposed by Domestic Carriers, Order No. E-17367, Aug. 25, 1961.

[7] Youth fares are in effect on Bonanza, Central, Frontier, Ozark, Pacific, Southern, Trans-Texas and West Coast Airlines. Since 1963, Frontier and Southern have permitted the making of reservations by youths traveling at the reduced rate.

[8] The airlines filing complaints were Delta Air Lines, Inc., Northwest Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., and Western Air Lines, Inc. Subsequent to the filing by American Airlines, similar youth fares were filed as defensive tariffs by Braniff Airways, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc. No review of the Board's order dismissing their complaints without a hearing was sought by the complaining airlines.

Delta subsequently filed a tariff similar to Allegheny's young adult fare. See note 5 supra.

The Board in dismissing the complaints limited its approval to an experimental one year period.[9] It also required the carriers to file quarterly reports containing statistical data and evaluations of the effectiveness of the tariffs.

The petitioners alleged before the Board and assert here on review that the tariffs are unreasonable and unjustly discriminatory in violation of the Federal Aviation Act of 1958 (FAA). They contend that the tariffs are unreasonable and uneconomic because they are not reasonably related to the fully allocated cost of transportation. They also contend that Allegheny's young adult tariff is unreasonable because there is no cost savings to the air carrier which would justify the reduced fare. They further allege that the young adult tariff is incapable of generating enough additional traffic to overcome the diversion from normal regular fare traffic and that the tariff is therefore not justified under the profit-impact test advanced by the Board.

The petitioners also assert that the fares are unjustly discriminatory because they are based solely on the identity of the traffic, which is "like" all other passenger traffic, and that the factors upon which the Board granted relief in approving the tariff were beyond the scope of its competence because such factors did not relate to carriage. It is alleged that the standby features of the military and youth tariffs do not differentiate the service from regular service in view of the low average load factors on most domestic flights; it is also pointed out that the reservation feature of the young adult tariff eliminates even that minor difference. In addition, the petitioners contend that the

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[9] The Board subsequently granted the unlimited extensions requested by five carriers: American, Northeast, United, Western, and Pan American Airlines, Inc. Pan American's reduced fare tariff applied only to flights between the west coast and Hawaii. One year extensions were requested by and granted to Braniff, Continental, Delta, Eastern, National, Northwest and Trans World Airlines. C.A.B. Press Release, Jan. 20, 1967. The propriety of those orders are not before us.

identification card requirement of the youth and young adult tariffs do not distinguish the service or serve as a valid distinction as compared with other promotional fares. Thus, the petitioners conclude, the tariffs offer like service to like traffic under the same or similar circumstances at a reduced rate and are therefore unjustly discriminatory in violation of § 404(b) of the FAA.

In dismissing the complaints, the Board ruled that the standby provisions of the military and youth tariffs sufficiently distinguish the service from that offered regular fare passengers, that the fare was not based solely on the identity of the traffic but was justified, in the case of the military standby tariff, by the national defense considerations advanced by the Secretary of the Army, and, in the case of the youth fares, by the traditional discounts offered youths by the transportation industry and the promotional effects of the tariff. The Board further found that the tariffs fostered the financial position of the industry by increasing revenue, improving the utilization of equipment and ground facilities, and filling seats which otherwise would be vacant. With respect to the young adult fares, the Board again noted the industry tradition of granting discounts to youths, the promotional aspects of the tariff, the potential for greater utilization of air transportation by a significant segment of the population not now using air transportation, and the impecunious state of those eligible under the tariff. It also observed that authorizing the tariffs on a one year experimental basis conformed generally with the policy of allowing airline management to exercise its discretion more freely to improve air transportation and increase air carrier traffic.

I.

At the outset we are presented with an argument which basically questions the standing of the petitioners to challenge the tariffs in issue, although the government contends that we do not actually have to reach the question

of whether the petitioners have standing in order to dispose of the case.[10] Essentially, the Board asserts that the petitioners have not shown that the action of the Board in approving the tariffs here in question subjects those persons whose interest the relevant portions of the FAA were designed to protect to any substantial harm, and therefore, they cannot object to the action of the Board. It argues that §§ 403(b) and 404(b) were intended to protect airline passengers, shippers, and communities served by air carriers from unjust discrimination, and undue and unreasonable preference or prejudice. The mere adverse economic impact of the approved tariffs on the petitioners, competitors of the air carriers, is an insufficient harm to warrant an investigation of suspension of rates.[11] Indeed,

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[10] On oral argument, counsel for the Board conceded, in effect, that under recent court decisions the petitioners have standing to prosecute this petition for review. Notwithstanding this concession, the Board maintains both in its brief and during oral argument that the petitioners have not assigned proper or sufficient reasons for their attack on the orders. In essence, the Board argues that even if the petitioners have standing, they have not set forth sufficient or adequate reasons to warrant judicial review of the action of the Board. We therefore deem it appropriate, and perhaps necessary, to deal with the question.

[11] The government insists that the decision whether or not to suspend a tariff is a matter committed to agency discretion and is not subject to judicial review. See § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) (1964); Arrow Transp. Co. v. Southern R.R., 372 U.S. 658 (1963). Because of the manner in which we dispose of the case, we find it unnecessary to pass on the question of whether we can review a Board decision suspending or not suspending a tariff.

For a general discussion of when judicial review may be obtained where action is committed by law to agency discretion, see Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 55 (1965); responded to in 4 Davis, Administrative Law Treatise § 28.16 (Supp. 1966), followed by a rejoinder, surrejoinder, rebutter and surrebutter in Administrative Arbitrariness, 114 U. of Pa. L. Rev. 783, 814, 816, 832 (1966). See also Jaffee, Judicial Control of Administrative Action 181-82, 375 (1966).

the Board asserts that it need not even specifically consider the effect of a proposed rate on surface transportation in determining whether a proposed tariff satisfies the requirements of the sections in question. Since the petitioners have not shown that the orders sought to be reviewed have harmed those protected by the Act, they can not complain of the action of the Board in approving the tariffs. In summary, the Board concludes that it is somewhat anomalous to allow the petitioners to object to tariffs which have widespread support in the air transportation industry and which have not been objected to by those not eligible to travel at the reduced rates offered under the tariffs.

In *Flying Tiger Line, Inc.* v. *CAB*, 350 F.2d 462 (D.C. Cir. 1965) the Court was presented with substantially the same issue as the one before us, albeit in a different factual background. There, Pan American World Airways, Inc. had filed a tariff which provided for the overseas carriage of military stores and impedimenta traveling under United States Government bills of lading for the Defense Department.[12] Flying Tiger, a competing air carrier, filed a complaint charging that the rates were unjustly discriminatory as a matter of law in violation of § 404(b) in that they were dependent on the status of the shipper, i.e. the tariffs provided for preferential treatment of one shipper, the Federal Government. The Board dismissed the complaint without a hearing. In affirming the Board, the Court concluded that no abuse of discretion had been

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[12] The petitioners distinguish *Flying Tiger* on the ground that it involved overseas and foreign transportation. As such the Board's discretion in approving any proposed tariff is substantially greater as such tariffs are controlled by Board regulations issued pursuant to § 403(b). While there is some plausibility to this interpretation of the decision, we do not choose to follow that interpretation. The opinion indicates that the proposed tariff applied mainly, not only, to overseas transportation by air, and the decision itself does not depend on any vagaries attributable to overseas or foreign transportation.

shown as the complaint did not make out a plausible case that the order would subject shippers, or other carriers to any substantial harm. 350 F.2d at 465.[13] The Court

[13] By disposing of the case in the manner in which it did, the Court did not reach the standing question. 350 F. 2d at 465.

held that the assertion by Flying Tiger that it was a "sometime shipper of freight over the routes covered by the tariff" did not satisfy the requirement that harm to shippers be demonstrated. It observed that the record did not disclose what, aside from its own equipment, Flying Tiger shipped. The government urges us to reach a similar conclusion, and thusly avoid reaching the issue of whether the petitioners have standing.

Sections 403(b) and 404(b)[14] provide in general terms,

[14] Sections 403 and 404 provide, in pertinent part, as follows:

Filing of Tariffs Required

"Sec. 403(a). Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation."

Observance of Tariffs; Rebating Prohibited

"(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extended to any person any privileges or facilities, with respect to matters required by the Board to be

that airline traffic, both passenger and cargo traffic, is to be treated equally by the air carriers. The sections are designed to insure that rates and services are offered on an equal basis to all who seek to use the air carriers. They were intended to protect the traveling public and were

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specified in such tariffs, except those specified therein. Nothing in this Act shall prohibit such air carriers or foreign air carrier, under such terms and conditions as the Board may prescribe from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors, widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis." 49 U.S.C. § 1373 (1964).

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Carrier's Duty to Provide Service, Rates, and Divisions

"Sec. 404(a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce

designed to effectuate the "rule of equality" in the air transportation industry.

The granting of preferential and discriminatory rates in an indiscriminate manner was one of the abuses, among others, which gave rise to the passage of the *Interstate Commerce Commission Act, New York, N.H. & H.R.R.*, 200 U.S. 361, 391-92, 50 L.ed. 515, 521 (1906); *Lichten* v. *Eastern Airlines, Inc.*, 189 F.2d 939, 941 (2 Cir. 1951), and both that Act and the Civil Aeronautics Act of 1938, as re-enacted in the Federal Aviation Act of 1958, were enacted to halt those abuses. The Civil Aeronautics Board is charged under §§ 102 and 1002 of the Act with, inter alia, enforcing the provisions of §§ 403(b) and 404(b) to protect the public interest. Failure on the part of the Board to implement and enforce these provisions of the Act, insofar as they relate to the transportation of passenger traffic, necessarily results in the preference of one class or group of passengers to the prejudice of another. As such, a harm to the traveling public results. The petitioners in seeking review of the action of the Board in approving the tariffs here in question, are acting in the interest of the public, and for the protection of a public right.

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just and reasonable individual and joint rates, fares and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

Discrimination

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 49 U.S.C. § 1374 (1964).

Although it was early held that a litigant could assert only his own rights, and was barred from asserting the rights of others, see *ICC* v. *Chicago, R.I. & P. Ry.*, 218 U.S. 88, 109, 54 L.ed. 946, 957 (1910), and cases cited therein; see also *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 82 L.ed. 374 (1938), subsequent decisions of the Supreme Court have substantially modified that rule insofar as review of administrative agency decisions is concerned. Thus, in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 84 L.ed. 869 (1940), the Court held that a competitor who was subject to adverse economic consequences as a result of an agency decision had standing under § 402(b) of the Federal Communications Act to contest the validity of an FCC order granting a new license to a competing station.

The scope and the nature of the action brought by a competitor to obtain judicial review of agency action was further defined in *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 86 L.ed. 1229 (1942), and *FCC* v. *NBC (KOA)*, 319 U.S. 239, 87 L.ed. 1374 (1943). Those decisions made it clear that a competitor was empowered to challenge agency action as contrary to law, and that the competitor was vindicating the public interest and right rather than his own. His status as a competitor and the harm to which the agency action subjected him gave him the standing to seek judicial review, but in so doing he was acting for the public benefit. The rationale supporting the competitor's right to bring such actions was fully explored and analyzed by Judge Frank in *Associated Indus.* v. *Ickes*, 134 F.2d 694 (2 Cir. 1943). It is unnecessary to belabor the question here. It suffices to observe that it is now a well established doctrine of broad application in the law of standing. See *National Coal Ass'n.* v. *FPC*, 191 F.2d 462 (D.C. Cir. 1951); see generally, 3 Davis, Administrative Law Treatise § 22.05 (1958).

Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1486 (1964) provides that "Any order,

affirmative or negative, issued by the Board . . . under this Act . . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition . . . . by any person disclosing a substantial interest in such order." Although the wording of this section varies from that of § 402(b)(2) of the Federal Communications Act[15] under which *Sanders Bros.* was decided, we think it is broad enough to confer standing on the petitioners under the teachings of *Sanders Bros. Cf. Alton R.R.* v. *United States,* 315 U.S. 15, 86 L.ed. 586 (1942); *The Chicago Junction* Case, 264 U.S. 258, 68 L.ed. 667 (1924); *National Coal Ass'n* v. *FPC, supra, Seatrain Lines, Inc.* v. *United States,* 152 F. Supp. 619 (Del. 1957).

Further, we believe that in the context of §§ 403(b) and 404(b) the petitioners have demonstrated, under the facts and in the circumstances of this case, a sufficient harm to the traveling public to warrant review. Thus, we find *Flying Tiger* factually distinguishable. The petitioners assert that the tariffs approved by the Board are uneconomic and unjustly discriminatory. To the extent that these allegations are established, a harm to the traveling public is established.[16] Rates which are unjustly discriminatory violate the provisions of § 404(b) and result in the very harm it was designed to prevent. An unjustly discriminatory rate affords favored service to those eligible under the tariff, and deprives those not eligible of equal treatment. In addition, rates that are uneconomic and un-

[15] Compare, § 10(a) of the Administrative Procedure Act which reads:

> "(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 1009(a) (1964).

[16] Whether they have stated sufficient facts to require the Board to investigate and suspend the tariffs is the essence of the issue before us and is discussed hereinafter.

reasonable injure the traveling public either by jeopardizing the financial stability of the air carriers,[17] or by forcing those persons not eligible to travel at the reduced rate to bear a greater and undue portion of the costs of operation. This shifting of operating costs results in placing an oppressive burden on the portion of the public not afforded the reduced rates. Therefore, it seems abundantly clear that the petitioners have alleged sufficient harm to the public to justify judicial review of the action of the Board.

II.

The regulatory scheme created by the Civil Aeronautics Act of 1938, 52 Stat. 977, and subsequently re-enacted in the Federal Aviation Act of 1958, 72 Stat. 731,[18] applicable in this proceeding, is incorporated in sections 403 and 404. As previously indicated, these sections infuse the "rule of equality" into the regulatory policy controlling rates in the air transportation industry. Section 403(a) provides that all rates and fares charged by an air carrier for air transportation to any point served by it shall be filed with the Board. The first sentence of § 403(b) precludes an air carrier from charging any rate, fare, or from offering any rebate, dispensation, or free trans-

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[17] The government argues that the airlines would not propose the tariffs if they did not improve the air carrier's financial position. The history of both the Interstate Commerce Commission and the CAB demonstrates that such is not always the case. Both regulatory agencies were established, in part, to avoid destructive competition resulting from actual or threatened price wars and both agencies have had to exercise their powers in this area. See ICC v. New York, N.H. & H.R.R., 372 U.S. 744, 758, 10 L. ed. 2d 108, 118 (1963); Air Freight Rate Investigation, 9 C.A.B. 340 (1948).

[18] The re-enactment of the Civil Aeronautics Act of 1938 by the Federal Aviation Act portended no change in policy or interpretation, but was re-enacted for the convenience of the legislative draftsmen of the FAA. See, e.g., H. Rep. No. 2360, 85th Cong., 2d Sess., 10-11 (1958).

[illegible] except as provided by a tariff filed with the [illegible] pursuant to § 403(a). The second sentence of the [illegible] permits the air carriers, subject to terms and [illegible] established by the Board, to give free or reduced-rate transportation to certain enumerated classes of persons, generally those closely connected with the air carrier. Section 404(a) requires the air carriers to serve all those who reasonably request air transportation at reasonable rates and in a reasonably safe and adequate manner. Unjust discrimination, unreasonable preference or prejudice against passengers, shippers, terminals, or points served are precluded by § 404(b).

The Board is empowered and charged under § 1002 [19]

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[19] Section 1002 provides in pertinent part as follows:

"Sec. 1002. (a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing."

* * * *

"(g) Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision

with the responsibility of enforcing the foregoing requirements as well as other provisions of the Act. Section 1002 gives the Board the power, either upon the filing of a complaint or on its own motion, to suspend and investigate tariffs when there is a reasonable ground to believe that a violation of the Act has been established. Under the language of the section, the Board has broad discretionary powers with respect to whether to investigate or suspend a tariff, *Nebraska Dept. of Aeronautics* v. *CAB*, 298 F.2d 286 (8 Cir. 1962), and it may dismiss, without a hearing, a complaint which is valid on its face when "it is of the opinion that it does not state facts which warrant investigation." *Flight Eng'rs. Int'l. Ass'n.* v. *CAB*, 332 F.2d 312 (D. C. Cir. 1964). On petition for review, the scope of a reviewing court's power is limited to a determination of whether the Board has abused its discretion. *Pan American-Grace Airways, Inc.* v. *CAB*, 178 F.2d 34 (D. C. Cir. 1949). Thus, we are simply to determine whether the

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thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation or practice shall go into effect at the end of such period: Provided, That this subsection shall not apply to any initial tariff filed by any air carrier." 49 U.S.C. § 1482(a)(9) (1964).

Board, in dismissing the complaints without a hearing, abused its discretion in concluding that the complaints failed to set forth sufficient facts to demonstrate that the tariffs in question violated the provisions of the FAA and did not require an investigation and possible suspension to protect the public interest.[20]

In dismissing the complaints the Board issued an order in each of the cases consolidated in this proceeding. The orders set forth the Board's reasons for denying the petitioners the relief they sought. Since the complaints could be dismissed without a hearing, the order need only comply with the requirements of § 6(d) of the Administrative Procedure Act, 5 U.S.C. § 1005(d), and not with the more stringent requirements of § 8(b), 5 U.S.C. § 1007(b). We find that these orders more than meet the procedural requirements of § 6(d), and further or more elaborate findings were not required. It should be noted, however, that in determining whether the Board abused its discretion in dismissing the complaints, we are limited to the orders actually issued, and the rationale advanced therein. It is on the basis of these findings and rationale that we are to test the exercise of discretion by the Board.

The petitioners contend first that reduced-rate transportation may be offered only to persons in those classes listed in § 403(b), and that reduced rates to any other class of persons is illegal per se. They assert that in enumerating the classes of persons to whom reduced rates may be granted, Congress intended to prohibit the granting of reduced rates to any other class of persons or any other traffic when the reduced-rate is offered on the basis of the identity or status of the traffic. Petitioners further urge since neither military personnel nor youths between ages

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[20] In Pan American-Grace Airways v. Civil Aeronautics Board, 178 F. 2d 34 (D. C. Cir. 1949) the court characterized the action of the Board in such cases as "a ruling tantamount to a court's order sustaining a demurrer to a petition or complaint."

of 12 and 22 are included in the classes of persons listed in § 403(b), the rates here in question are unlawful. The Board argues that § 403(b) permits air carriers to grant reduced rate transportation to those classes of persons listed in the section relatively free of Board control. In granting such transportation, it continues, an air carrier need not satisfy the requirements of § 404(b) and rates offered such persons may not be found violative of the strictures of § 404(b). However, the Board contends that § 403(b) is not exclusive and that it does not preclude the offering of reduced-rate transportation to other persons, provided such transportation complies with the requirements of § 404(b). Thus, the list of persons to whom reduced-rate transportation may be given is illustrative and not exclusive.

The petitioners base their contention mainly on the 1956 amendment to § 403(b) which permitted reduced-rate transportation on a standby basis to members of the clergy, and the refusal of Congress in 1959 to amend § 403(b) to permit reduced-rate transportation to military personnel. They assert that in both instances it was the understanding of Congress that reduced-rate transportation could not be offered to these two groups without an amendment of the statute.[21] Thus, they conclude, the section must be construed to be exclusive in order to effectuate this clear manifestation of Congressional interpretation of the statute.

As indicated earlier, reduced-rates for military personnel were permitted under Board regulation issued pursuant to § 403(b) for travel to Alaska and Hawaii. However, when

[21] Hearings on Airlines Fares for Ministers Before the House Subcomm. on Interstate & Foreign Commerce, 84th Sess. 2d Sess. 2, 3, 5 (1956); H.R. Rep. No. 2183, 84th Cong., 2d Sess. 1 (1956); S. Rep. No. 1281, 86th Cong., 2d Sess. 3, 9 (1958); Hearings Before Subcomm. of the House Comm. on Interstate & Foreign Commerce on Airline Pass. Privileges, 86th Cong., 1st Sess. 12, 14 (1957); Hearings Before the Aviation Subcomm. of the Senate Comm. on Interstate & Foreign Commerce, 86th Cong., 2d Sess. 3, 20 (1958).

these territories became states, travel between them and the continental United States was no longer "overseas" transportation, but became interstate transportation. As a result the Board could no longer authorize reduced-rates since the provision of § 403(b) granting the Board authority to regulate overseas transportation was no longer applicable. To enable the air carriers to continue giving the reduced rates, the Board sought Congressional action in the form of an amendment to § 403(b).[22] Congress refused to alter the section. From this refusal to act, and the earlier amendment with respect to members of the clergy,[23] the petitioners infer that reduced rates may only be offered to those persons listed in § 403(b). We do not think such a conclusion need be drawn from either the amendment or from the refusal of Congress to amend the section.

When § 403(b) was amended to permit reduced-rate service for members of the clergy and at the time the Board sought the amendment to allow the giving of reduced-rates to military personnel, a substantial question was raised, as it is now, whether air carriers could, consistent with § 404(b), offer such transportation.[24] Prior to 1959 the Board had taken an extremely stringent line in enforcing the unjust discrimination provisions of § 404(b).

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[22] The Board actually sought an amendment which would permit the giving of reduced rates to military personnel for travel anywhere in the United States. The Senate adopted a bill which would have permitted the reduced rates only for travel to Hawaii or Alaska, S. Rep. No. 1281, supra note 21, but the provision was killed in the conference committee. 106 Cong. Rec. 14770-71 (1960).

[23] The Board opposed the inclusion of members of the clergy in § 403(b) on policy grounds. See Hearings Before the Subcomm. of the House Comm. on Interstate Commerce on Airline Fares for Ministers, 84th Cong., 2d Sess. 2-4, 9-11 (1956).

[24] The Board had held reduced fares for ministers was violative of § 404(b). Hearings, supra, note 23, at 21.

See *Capital Group Student Fares,* 25 C.A.B. 280 (1957); *Free and Reduced Rate Transp.* Case, 14 C.A.B. 481 (1951); *Tour Basing Fares,* 14 C.A.B. 257, 259 (1951); *Summer Excursion Fare* Case, 11 C.A.B. 218 (1950); *ATC Fare Discounts,* 29 C.A.B. 1344 (1959). On the basis of this decisional law, and the approach of the Board to the problems of unjust discrimination, the Board might well have concluded that such reduced fares were likely to be unjustly discriminatory. Therefore, in order for the air carriers to offer such rates an amendment to § 403(b) would have been required. Viewed in this context, the refusal of Congress to amend the section does not require us to construe the section as an exclusive limitation on the granting of reduced-rates. Rather, it merely indicates that where a reduced rate is violative of § 404(b), the class of persons to whom the rate is offered must be among the enumerated classes in § 403(b). This analysis comports with the interpretation of the section by the Board as it indicates that reduced rates may be offered to the classes listed in § 403(b) with impunity and irrespective of any possible violation of § 404(b). Thus, we conclude that the legislative history of the Board's unsuccessful attempt to amend § 403(b) does not vitiate, but rather strengthens, the construction of § 403(b) and 404(b) by the Board. See *American Trucking Ass'n.* v. *Atchison, T. & S.F. Ry.,* ... U.S. ..., 35 U.S.L.W. 4465, 4471 (May 29, 1967).

Further, the Board has consistently reviewed under § 404(b) tariffs which proposed reduced-rates for groups or classes or persons not included in the § 403(b) listing, e.g., *Nonpriority Mail Rate* Case, 34 C.A.B. 143 (1961); *Certified Air Carrier Military-Tender Investigation,* 28 C.A.B. 902 (1959); *Capital Group Student Fares,* 26 C.A.B. 451 (1958), and early held that § 403(b) was not an exclusive list of persons to whom reduced-rate transportation may be afforded. *Airline Pass Agreement,* 1 C.A.B. 677 (1940) (Dictum); *ATC Resolutions re Travel Agents*

& Tour Conductors, 31 C.A.B. 990, 992 (1959).[25] While the construction of an enabling statute by an administrative agency is not binding on the courts, it is entitled to great weight. *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 89 L.ed. 125 (1944); *United States* v. *American Trucking Ass'n.,* 310 U.S. 534, 84 L.ed. 1345 (1940). It is the interpretation of the intent of Congress by those charged with effectuating that intent. In addition, the administrative agency is continually involved and vitally concerned with the operation of the statute; the expertise developed through its intimate contract [sic] with the problems of the area and the operation of the statute should not lightly be ignored. See *American Airlines, Inc.* v. *C.A.B.,* 231 F.2d 483, 488 (D.C. Cir. 1956) (concurring opinion); *American Airlines, Inc.* v. *CAB,* 178 F.2d 903 (7 Cir. 1949). In the instant case the Board's construction of the statute is not only a reasonable one but it is generally consistent with the construction given the analogous section 22 of the Interstate Commerce Commission Act, 49 U.S.C. § 22 (1964); see *Nashville C. & St. L. Ry.* v. *Tennessee,* 262 U.S. 318, 67 L.ed. 999 (1923); *ICC* v. *Baltimore & O.R.R.,* 145 U.S. 263, 36 L.ed. 699 (1892); *Tennessee Prod. & Chem. Corp.* v. *Louisville & N.R.R.,* 319 I.C.C. 497 (1963). Since the Civil Aeronautics Act of 1938 was modeled after the I.C.C. Act, the latter provides an appropriate guide in construing the section before us. *Cf. American Airlines, Inc.* v. *North American Airlines, Inc.,* 351 U.S. 79, 82, 100 L.ed. 953, 960 (1956); *ICC* v. *Delaware, L. & W. R.R.,* 220 U.S. 235, 55 L.ed. 448 (1911). In discussing the interpretation to be given to section 22 in relation to sections 2 and 3 of

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[25] The Board in two cases intimated in preliminary orders that § 403(b) was exclusive, ATC Fare Discounts, 29 C.A.B. 1344 (1959); ATC Tour Conductor's Fare Transp., 29 C.A.B. 1345 (1959), but in the final order it rejected that construction. ATC Resolution re Travel Agents and Tour Conductors, 30 C.A.B. 1552 (1960).

the Act, the portions of the Act analogous to § 404, the Supreme Court said:

> "The unlawfulness defined by sections 2 and 3 consists either in an 'unjust discrimination' or in an 'undue or unreasonable preference or advantage,' and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust." *ICC* v. *Baltimore & O.R.R., supra,* 145 U.S. at 278, 36 L.ed. at 704.

It is therefore clear that the construction of the analogous section 22 is consistent with the Board's construction of section 403(b).

Although section 22 of the I.C.C. Act specifically provides for reduced rate transportation for military personnel, we do not think that fact undermines the correctness of the construction of section 403(b) advanced by the Board. Military personnel were included in section 22 by way of amendment after the railroads had offered reduced rate transportation to servicemen. The section was amended to insure the continuance of such transportation by precluding any determination that the reduced rates violated section 2 or 3 of the Act. See S. Rep. No. 1141, 78th Cong., 2d Sess. 2 (1945); 90 Cong. Rec. 7385 (1944). That Congress believed it necessary to include the provision in the section does not indicate that § 403 is exclusive.

Nor do we believe that either *Slick Airways, Inc.* v. *United States,* 292 F.2d 515 (Ct. Cl. 1961), or *United States* v. *Associated Air Transp., Inc.,* 275 F.2d 827 (5 Cir. 1960), challenge the construction advanced by the Board. In both *Slick* and *Associated* the issue was whether the government was bound, under its contract with the air carriers

for the carriage of military goods and personnel, by the tariff filed by the air carriers pursuant to § 403(a). The Court in both instances held that the tariff was controlling and the government was bound under its contract to pay the tariff rates. The cases are factually and legally distinguishable; they do not aid in the resolution of the issue before us.

We agree with the conclusion of the Board that § 403(b) merely permits the granting of reduced-rate transportation to the classes of persons enumerated in the section without regard to whether such rates meet the requirements of § 404(b), and does not preclude the giving of discriminatory rates in a proper case to other classes of persons. The limitation on such discriminatory rates is contained in § 404(b). This construction of the sections accords with common sense and produces a reasonable and rational result. The legislative history of the amendments to § 403(b) do not require a different construction. Accordingly, we conclude that the tariffs here in question are not unlawful because the persons to whom the reduced-rate transportation is offered are not listed in § 403(b). *Flying Tiger Line, Inc.* v. *CAB,* 350 F.2d 462 (D.C. Cir. 1965); *American Airlines, Inc.* v. *CAB,* 178 F.2d 903 (7 Cir. 1949).

III.

We turn now to the major issue raised by these petitions for review: whether the Board, in dismissing the petitioners' complaints without a hearing, abused its discretion in concluding that the complaints failed to set forth sufficient facts to warrant investigation of whether the tariffs here in question were unjustly discriminatory. The Federal Aviation Act of 1958 does not define the term unjust discrimination, but it is acknowledged that the term refers to section 2 of the Interstate Commerce Commisson Act which precludes different treatment of like traffic for like and contemporaneous service under substantially

similar circumstances and conditions. *Wight* v. *United States,* 167 U.S. 512, 42 L.ed. 258 (1897); *ICC* v. *Delaware, L. & W.R.R.,* 220 U.S. 235, 55 L.ed. 448 (1911); *Summer Excursion Fares,* 11 C.A.B. 218 (1950). Such discrimination may result from the charging of different rates to different shippers or passengers afforded the same service, *Wight* v. *United States, supra; International Air Freight Forwarders Investigation,* 27 C.A.B. 658 (1958), or from the offering of special services to only a select patron or group of patrons. *Baltimore & O. R.R.* v. *United States,* 305 U.S. 507, 83 L.ed. 318 (1930); *Seaboard Air Line Ry.* v. *United States,* 254 U.S. 57, 65 L.ed. 129 (1920); *Capital Group Student Fares,* 25 C.A.B. 280 (1957). In either situation, the result is that the carrier is giving preferential treatment to one person or group of persons to the prejudice of another, and contrary to the requirement that all those who seek the service of a carrier must be treated equally.

For a tariff to be unjustly discriminatory the service offered to a limited class of persons must be rendered under substantially similar circumstances and conditions as the service rendered to those not eligible under the tariff. The petitioners contend that in determining whether the circumstances and conditions of service are substantially similar the Board may consider only those factors which are directly related to carriage such as cost of service. Thus, they assert that the existence or extent of competition, the social desirability, the military need, or factors relating to the status of the traffic are irrelevant since they are not directly related to carriage. Therefore, such factors cannot be used as a basis for justifying a discriminatory tariff on the ground that the circumstances and conditions of service are not substantially similar. The Board, on the other hand, argues that all the factors reasonably related to the tariff, including the public welfare, the good of the air carriers, the interest of the communities served, the competitive situation, and the

needs of national defense may be considered in determining whether a rate is unjustly discriminatory. We think the petitioners' position does not go far enough, and the Board's position goes too far.

The early decisions of the Supreme Court construing sections 2 and 3 of the ICC Act drew a distinction between the sections as to the factors which may be considered in determining whether the circumstances and conditions of service were substantially similar.[26] *ICC* v. *Alabama M. Ry.*, 168 U.S. 144, 42 L.ed. 414 (1897). The Court construed section 2 to apply only to situations where persons utilizing the same route were subjected to disparate treatment, and therefore concluded that factors unrelated to costs of transportation could not be considered in determining whether the circumstances and conditions were substantially similar. *Wight* v. *United States, supra; ICC* v. *Delaware, L. & W.R.R., supra; ICC* v. *Baltimore & O.R.R.*, 225 U.S. 326, 56 L.ed. 1107 (1912); *Seaboard Airlines Ry.* v. *United States, supra; Louisville & N.R.R.* v. *United States*, 282 U.S. 740, 75 L.ed. 672 (1931). Thus, reduced rates for groups of ten or more ticketed as a group were held not unjustly discriminatory as the reduction was reasonably related to the reduced costs of transportation, *ICC* v. *Baltimore & O.R.R.*, 145 U.S. 263, 36 L.ed. 699 (1892), but the granting of extra services for one shipper and not for another was held illegal even though competitive considerations necessitated the granting

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[26] Section 3 prohibits undue preference and prejudice and differs from the unjust discrimination proscribed by section 2 in that it deals with the disparate treatment of localities as well as persons in such a manner as to prejudice one in favor of another. Thus, the charging of a greater rate for a shorter distance, or the charging of a different rate for substantially equal distances so that traffic is diverted from one person or locality to another falls within the purview of section 3 prohibitions. See ICC v. Alabama M. Ry., supra; Texas & P. Ry. v. ICC, 162 U.S. 197, 40 L. ed. 940 (1896); Cf. Texas & P. Ry. v. ICC, 289 U.S. 627, 77 L. ed. 1410 (1933).

of those added services. *Wight* v. *United States, supra.* Section 3 however, was given a broader construction. The Court construed the section to apply to the treatment of different localities and persons in such a manner as to favor one locality or community and the people therein over another. Since the section is concerned with the relationship of the carrier with persons and communities in varying localities and situations, the Court held that the Commission could consider competition and the other factors which normally are relevant in determining rates in deciding whether the circumstances and conditions attending the service of these communities were substantially similar. *Texas & P. Ry.* v. *ICC,* 162 U.S. 197, 40 L.ed. 940 (1897);[27] *ICC* v. *Alabama M. Ry., supra; United States* v. *Illinois Central R.R.,* 263 U.S. 515, 68 L.ed. 417 (1924). However, as the regulatory pattern under the ICC Act developed, the factors which would justify disparate treatment under section 3 were limited to competition and factors directly relating to the cost of carriage or transportation. Compare *Texas & P. Ry.* v. *ICC,* 162 U.S. 197, 40 L.ed. 940 (1897), and *Alabama M. Ry.* v. *ICC, supra,* with *United States* v. *Illinois C.R.R., supra,* and

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[27] While Texas & P. Ry. v. ICC, supra, appears at first blush to be a case of unjust discrimination, it actually involved undue preference and prejudice. See ICC v. Alabama M. Ry., supra. The decision sanctioned lower rates for the carriage of foreign cargo traveling pursuant to rates set from the point of departure to the point of destination, than rates charged for domestic cargo. To that extent, therefore, it would appear to be a case of unjust discrimination. However, the complaint had been filed with the ICC by the New York Board of Trade & Transportation alleging that cargo arriving via the Port of New Orleans for western cities was transported at a lower rate than that charged for the carriage of goods via the Port of New York and destined for points west. Thus, the issue was whether the reduced rates unduly prejudiced the Port of New York to the preference of the Port of New Orleans. The Court, in holding that they did not, focused on the competition that existed from shipping with respect to the western cities.

Nashville, C. & S.L. Ry. v. *Tennessee,* 262 U.S. 318, 67 L.ed. 999 (1923).

When the jurisdiction of the ICC was increased to include water carriers and motor carriers, this rigid distinction between the factors relevant under section 2 and those relevant under section 3 lessened, and competitive factors were considered under section 2 in determining whether the circumstances and conditions were substantially similar. *Baltimore & O. R.R.* v. *United States,* 305 U.S. 507, 83 L.ed. 318 (1938); *Eastern-Central Motor Carriers Ass'n.* v. *United States,* 321 U.S. 94, 88 L.ed. 668 (1944). The existence of competition was to be considered in light of the National Transportation Policy and the ICC was enjoined to preserve the inherent advantages of each form of transportation. *ICC* v. *Mechling,* 330 U.S. 567, 91 L.ed. 1102 (1947); *ICC* v. *New York, N.H. & H.R.R.,* 372 U.S. 744, 10 L.ed. 2d 108 (1963); *Cf. United States* v. *Pennsylvania R.R.,* 323 U.S. 612, 89 L.ed. 499 (1945). But even then, discrimination motivated by the competition of other forms of transportation remained unjustly discriminatory if uneconomic and destructive of the inherent advantages of the competing form of transportation. *ICC* v. *Mechling, supra; United States* v. *Pennsylvania R.R., supra;* see *ICC* v. *New York, N.H. & H.R.R., supra.* While competition became a relevant factor in determining whether a rate was unjustly discriminatory, the full panoply of policy considerations which might bear on the reasonableness of a discriminatory rate classification, and which the Board argues it may consider, were not appendaged to the factors which are relevant in determining if a rate is unjustly discriminatory, or unduly preferential and prejudicial.

It is against this background of rate regulatory policy that we approach the issue of what factors the Board may consider in determining whether a tariff is or is not unjustly discriminatory because the circumstances and conditions are or are not substantially similar. The weight

to be given the various factors in a particular case is a matter for the Board, *United States* v. *Chicago Height Trucking Co.*, 310 U.S. 344, 84 L.ed. 1243 (1940), but the factors which are to be considered is a question of statutory interpretation and consequently is for the courts as well as the Board. See *Eastern-Central Motor Carrier Ass'n.* v. *United States, supra; ICC* v. *New York, N.H. & H.R.R.*, 372 U.S. 744, 10 L.ed.2d 108 (1963).

Although the judicial interpretation given the Interstate Commerce Commission Act is relevant in determining what factors the Board is to consider under § 404(b) of the FAA, there are fundamental statutory differences between the ICC Act and the FAA which effect the factors which are material in deciding whether the circumstances and conditions of service are substantially similar. The ICC is charged with regulating three competing modes of transportation in accordance with the national transportation policy, and must insure the adequacy of each of the modes to meet the needs of the national defense. *ICC* v. *New York, N.H. & H.R.R., supra,* 372 U.S. at 761-64, 10 L.ed.2d at 120-21. The Board, on the other hand, is solely concerned with the needs of air transportation and it need not specially consider the impact of tariffs on competing surface or water carriers. *New York-Florida* Case, 24 C.A.B. 94, 119-20 (1956); *Northeast Airlines, Consolidation of Routes,* 6 C.A.B. 541, 545-46 (1945). See *Flying Tiger Line, Inc.* v. *CAB,* 350 F.2d 462 (D. C. Cir. 1965). In addition, the organic statute of the Board sets forth certain factors and objectives which the Board is enjoined to consider in exercising its regulatory function. *American Airlines, Inc.* v. *CAB,* 192 F.2d 417 (D. C. Cir. 1951).

But neither the differences between the statutes, nor the enumeration of relevant factors in the FAA gives the Board license to resort to the full spectrum of broad social policy considerations which might rationally bear on the issue of whether the circumstances and conditions of serv-

ice are substantially similar. *Cf. Western Airlines, Inc.* v. *CAB,* 347 U.S. 67, 98 L.ed. 508 (1954); *American Overseas Airlines, Inc.* v. *CAB,* 254 F.2d 744 (D. C. Cir. 1958). Rather, the spectrum is limited to those factors which Congress has by statute deemed material, and those factors which regulatory practice in the transportation industry has, through experience, found relevant. For while the Board has acquired an expertise in matters relating to air transportation, that expertise does not extend to and include all the social policy factors which it here argues it may evaluate and consider. The implementation of social policy on a broad and expansive scale is, within the Constitutional framework, a matter for Congress. While Congress may delegate to an administrative body, under appropriate guidelines, the actual implementation and execution of a general social objective incorporated in a statute, an intent to commit such matters to the agency must appear either explicitly or by necessary implication in the enabling statute. We are unable to find such delegated authority which would enable the Board to consider social policy factors which are not incorporated in the Federal Aviation Act or which have not been deemed relevant in the course of the history of rate regulation in the transportation industry.

Thus, rather than conferring upon the Board the authority to implement and effectuate social policy on a general scale, the factors which the FAA requires the Board to consider are closely related to the air transportation industry. Under section 102 of the Act the Board is directed to encourage and develop the air transportation industry, to preserve the inherent advantages of travel by air, and to promote adequate, economical service at reasonable rates. The Board is enjoined to insure that rates are not unjustly discriminatory, unduly prejudicial or preferential, or the product of destructive competition. The Board is also to assure the development of the industry to meet the needs of the postal service and the national

defense. Similar provisions are made relevant in determining reasonable rates under section 1002(e). Both of these sections when read in the context of the statute as a whole make clear, however, that equality of treatment is paramount and that the factors are to be weighed in light of that pervasive requirement. Thus, the Board has recognized and held that neither the promotional aspect of a tariff nor the increased revenue produced by a tariff will justify an otherwise unjustly discriminatory tariff.

> "The most favorable conclusion that could be drawn from the justification advanced by the carriers is that the tour basing fares will increase their net revenues. Conceding *arguendo* that the fares will increase the carriers' revenue, we must conclude that this *in itself*, would not be a sufficient justification for a discriminatory fare. (Cf. the *Hawaiian Common Fares* Case, 10 C.A.B. 921, 927 (1950)).
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> In formulating a standard of unjust discrimination, the Congress did not intend to limit the Board to passing judgment on the business acumen of air carriers management and to require the Board to rule that a fare discrimination is justified in every case where the carrier may benefit therefrom. Nor did Congress intend that we were merely to guard against improvidence in reducing fares. We can not lose sight of the fact that the air carriers here involved are public utilities. And as a public utility, in return for the privilege of operating in a more limited competitive atmosphere as well as enjoying other benefits, an air carrier assumes certain obligations, one of which is the duty to provide service to all who request it on equally favorable terms. It is our opinion that this is the duty which Congress intended to underscore when it established the prohibition against unjust discrimination." *Tour Basing Fares,* 14 CAB 257, 258-59 (1951) (Emphasis in the orig.)

Accord, *Free and Reduced-Rate Trans.* Case, 14 C.A.B. 481 (1951). Thus, these factors, even though relevant, are not to be used as a mere camouflage for essentially disparate treatment of persons using the services of an air carrier. *ICC* v. *Baltimore & O.R.R.*, 225 U.S. 325, 342, 56 L.ed. 1107, 1112 (1912). The rule of equality is the very core and essence of the fare structure in the transportation industry, and it should not be rendered a meaningless phrase by the use of spurious justifications for unjustly discriminatory rates.

IV.

Having laid this predicate, we come now to the factual controversy here presented. Initially, the parties discuss at great length whether the service offered under the military and youth tariffs is "like" service as compared with the service afforded regular fare passengers. The petitioners assert that the standby and "bumping" features do not sufficiently differentiate the service from regular fare service in light of the low level load factors existing on most flights. The Board concluded that the inconveniences attending the standby tariffs rendered the service "unlike" service,[28] and we believe those findings to be adequately supported. *American Airlines Military Fares,* 38 C.A.B. 1038 (1963). Thus, we are left solely with the question of whether the air carriers may validly offer the inferior and lower cost service to only a select group of persons without unjustly discriminating against the rest of the traveling public. The answer to that question depends on whether the circumstances and conditions are substantially similar. *Merchants Warehouse Co.* v. *United States,* 283 U.S. 501, 75 L.ed. 1228 (1931);

[28] As evidence of the materiality of the inconvenience of the standby tariff, see H. Rep. No. 96, 89th Cong., 2d Sess. (1966). See generally Hearings Before the Special House Subcomm. of the Comm. on Armed Services on Commercial Air Transp. for Service Personnel while on Authorized Leave (1966).

Reduced Fares for U.N. Employees, Order No. E-19519, Apr. 23, 1963; *Caribair Airlines, Student Standby Fares,* Order No. E-21667, Jan. 12, 1965. That test is the same as the test which must be met where service is "like" service. *ICC* v. *Baltimore & O.R.R.*, 145 U.S. 263, 281, 36 L.ed. 699, 705 (1892). In the latter situation, the discrimination is in charging different rates for the same service, while the discrimination raised by the standby tariffs results from its limitation to servicemen and youths between the ages of 12 and 22, thus denying the service to the general traveling public.[29]

There appears to be little question but that the service provided under the young adult tariff is "like" service as compared with that given regular fare passengers, and we do not read the Board's order as concluding otherwise. The tariff permits the making of reservations, and provides no dissimilarity in actual service. The requirement that an identification card be purchased yearly at a nominal cost is too slight a distinction to differentiate the service and appears to be more in the nature of a device to control abuse. Therefore, as to both standby tariffs and the young adult tariff, we must determine whether the Board abused its discretion in finding the circumstances and conditions of service substantially dissimilar.

Because of the substantial differences between the basis of the Board's action with respect to the military tariff and the youth and young adult tariffs, we shall treat the military tariff separately.

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[29] Historically, only the charging of different rates for like service was unjust discrimination, see 49 U.S.S. § 2 (1964), and the charging of different rates for different service to a limited class fell within the purview of section 3 as undue prejudice. *Compare* Wight v. United States, supra, *with* ICC v. Alabama M. Ry., supra, *and* ICC v. Inland Waterways Corp., 319 U.S. 671, 87 L. ed. 1655 (1943). See also L. T. Barringer & Co. v. United States, 319 U.S. 1, 87 L. ed. 1171 (1943).

A. THE MILITARY STANDBY TARIFF

In dismissing the complaints, the Board relied on its former decision which had approved the tariffs on a temporary basis. See *American Airlines Military Fares*, 38 C.A.B. 1038 (1963). It held that the interests of national defense, including the morale of the servicemen, the competition from surface carriers which offer reduced rate transportation to military personnel, the need to increase the amount of military traffic carried by the airlines, the promotional aspects of the tariff, and the increased utilization of equipment with a resulting improved profit picture were all factors which rendered the circumstances and conditions essentially dissimilar. The Board further argues before us that the granting of a discount to the government is not unjustly discriminatory as the benefit of the reduced rates inure to the public. It contends therefore that the policy considerations which justify reduced rates for the United States Government also applies to these tariffs.

In support of its position, the Board relies on its decision in *Certificated Air Carrier Military-Tender Investigation*, 28 C.A.B. 902 (1959). There the Board approved tariffs which provided for a reduction of 10% on first class rates for military personnel traveling at government expense on either chartered or regularly scheduled flights. The Board rested its decision on the competitive necessity created by the reduced-rates offered by surface carriers, and the decreased costs involved in transporting groups of military personnel. These factors, it concluded, rendered the circumstances and conditions of service dissimilar. Since the Board resolved the issue in the manner it did, the decision does not support the more general assertion raised here that reduced rates may be offered to military personnel as a general rule. Rather, it would seem to indicate that reduced rates for servicemen must be justified on the same basis as other reduced rates, namely on the grounds that factors independent of their status as servicemen rendered the conditions of service dissimilar.

In addition, we do not believe the case stands for the proposition that reduced-rates may be granted to the United States Government because it is the government, since the Board specifically rejected that argument in reaching its conclusion. 28 C.A.B. at 911. See also *Slick Airways, Inc.* v. *United States*, 292 F.2d 515 (Ct. Cl. 1961); *United States* v. *Associated Air Transp. Inc.*, 275 F.2d 827, 833 (5 Cir. 1960). But even assuming that reduced rates for the United States government might be justified under § 404(b) purely on the basis of status, that does not serve to justify the tariffs here in question which are applicable to servicemen traveling at their own expense. The rationale which sanctions reduced rates for the government rests on the argument that the reduced rates lower the transportation costs of the government, and that that cost reduction inures to the public weal, see *ICC* v. *Baltimore & O.R.R.*, 145 U.S. 263, 278 (1892). But here the cost of transportation is borne by the individual serviceman, and the government realizes no reduction in the cost of transportation.

However, we do not read the Board's order as basing its decision on either of these factors. Rather, we approve the Board's conclusion that the reduced rates were justified by competitive considerations and that the tariff adapted the air transportation industry to the needs of the national defense.[30] The Board noted that surface carriers give reduced rates to military personnel and that users of

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[30] In ICC v. New York, N.H. & H.R.R., 372 U.S. 744, 762, 10 L. ed. 2d 108, 120 (1963), the Court, in a unanimous opinion dealing with an order of the I.C.C. stated with respect to consideration of the national defense:

> "Nor can we conclude that the statutory references to such vital considerations as national defense are mere window dressing, without any practical significance in terms of the Commission's function. 'Congress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates in light of the needs of national defense.' United States v. Capital Transit Co., 325 US 357, 362, 89 L ed 1663, 1668, 65 S Ct 1176."

surface transportation at those rates were not subject to the inconveniences of standby service. It concluded that the tariffs were a reasonable means by which air carriers could effectively compete for military business. Further, reduced rates to servicemen traveling on furlough or leave enable them to spend less time in transit and thereby allow them to better utilize their furlough or leave time. The Board found on the basis of the assertions advanced by the Department of the Army that the reduced rates aided and increased the morale of the armed forces, thus contributing to the national defense. In so doing, the reduced rate tariffs permit the air carriers to better meet the needs of the national defense. Both competition and adapting the air transportation industry to the needs of national defense are considerations which may validly be weighed by the Board in determining whether a tariff is unjustly discriminatory, *Cetificated Air Carriers Military-Tender Investigation, supra;* § 102 of the FAA, 49 U.S.C. § 1302 (1964), and we can not say that the Board abused its discretion in reaching the factual decision it did. *American Trucking Ass'n* v. *FCC,* No. 19427, D. C. Cir., Sept. 15, 1966, cert den., 35 U.S.L.W. 3304 (Feb. 27, 1967).

B. Youth Standby and Young Adult Tariffs

As to both these tariffs the Board concluded that the circumstances and conditions of service were dissimilar on the grounds that reduced rates for youths have traditionally been part of the transportation rate scheme, that the tariffs are a promotional device directed at a homogenous group of persons which because of its financial dependence does not normally use air transportation, that the reduced rate permitted a greater utilization of existing facilities, and that approval was consistent with the Board's policy of allowing airline management to exercise its discretion more freely. The petitioners contend that the tariffs can be justified only on the impermissible considerations of the status of the traffic, and are therefore unjustly discriminatory.

As noted earlier, reduced rates for children have traditionally been part of the rate scheme in the transportation industry, and they have never been attacked as unjustly discriminatory. The Board has, however, ruled that children under 12 who are not accompanied by an adult may be charged regular fare. *Full Fares for Unaccompanied Children,* 24 C.A.B. 408 (1956). In reaching that conclusion, the Board found that the costs of transportation was equal to that of adults, and therefore the airlines could charge them full fare. 24 C.A.B. at 410.[31] The Board argues here that the decision by necessary implication held that reduced rates for children under 12 are not unjustly discriminatory. We have examined the opinion with great care, and find it lacking in cogency. Consequently, we are extremely hesitant to rely on it for anything other than its exact holding. But we are not presented with the issue of whether the time-honored practice of giving reduced-rates for children under 12 is unjustly discriminatory.

The tariffs before us provide for reduced rates for youths between the ages of 12 and 22. The only way in which a determination that reduced rates for children under 12 are not unjustly discriminatory bears on the tariff before us is if such tariffs are not unjustly discriminatory because age is per se a distinguishing condition which, in and of itself, renders the conditions and circumstances of service dissimilar. We do not construe the Board's decision in *Full Fares for Unaccompanied Children to* stand for that

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[31] The dissenting opinions argued most cogently that the comparison of costs was to be made against the costs of transporting accompanied children as the tariffs were unjustly discriminatory, if at all, because they discriminated against unaccompanied children in favor of the accompanied child. Since the evidence failed to demonstrate any cost variation between accompanied and unaccompanied children the dissenters concluded that the rates were unjustly discriminatory. 24 C.A.B. 415.

proposition,[82] and on the basis of the history of rate regulation in the transportation industry, we do not believe such a proposition to be valid. While the ICC in two early cases did state in dicta that commutation tickets could be issued to children of school age, *Commutation Tickets for School Children,* 17 I.C.C. 144 (1909); *Bitzer* v. *W-V Ry.,* 24 I.C.C. 255 (1912), when read in the context of the decision itself and against the background of rate policy which required reduced rates to be available to all, we do not find those statements persuasive. Aside from being dicta, the Commission disposed of the actual issue before it on the basis of its decision in *In Re Party Rate Tickets,* 12 I.C.C. 95 (1907) which held that reduced rates for party tickets could only be issued if they were available to all, and that factors relating to the type of passenger or his status could not be considered. Accord *Smith* v. *Northern P. R.R.,* 1

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[82] See Ozark Air Lines Senior Citizens Excursion Tariff, Order No. E-21973, Mar. 31, 1965; Mohawk Airlines "Golden Age Excursion Tariff," Order No. E-17111, July 6, 1961. Both these cases involved tariffs which provided for reduced rates for men over the age of 65 and women over the age of 62. In both cases the Board concluded that the tariffs appeared to be unjustly discriminatory in that they discriminated against those under 62. Investigation was ordered. In *Ozark Air Lines* the Board stated:

> "On the basis of all facts and information before it, the Board concludes that Ozark's Senior Citizens tariff should be investigated. The tariff would apparently permit the like and contemporaneous transportation of persons at least 62 years of age under circumstances and conditions substantially similar to those under which persons less than 62 years old would be transported, but at greatly reduced fares. Absent any strong justification therefor, this situation appears to contain the elements of unjust discrimination, for no valid distinction between persons under 62 and those 62 and older has been brought to our attention."

Thus, it appears that the board has not viewed age, in and of itself, as a factor which renders the circumstances and conditions of service dissimilar.

I.C.C. 611 (1887);[33] see *ICC* v. *Baltimore & O.R.R.*, 145 U.S. 263, 36 L.ed. 699 (1892). Further, section 22 of the ICC Act excises commutation tickets from the unjust discrimination provisions of section 2. We therefore believe that the Commission's bare statement without analysis and in dicta is an insufficient predicate upon which to base such a radical departure from the general rules of rate making. In view of the absence of any logically supportable rationale consistent with the general limitations on the factors which are relevant to a determination of whether the circumstances and conditions of service are substantially similar, we are constrained to conclude that age alone is, as a general rule, not a relevant consideration. In so concluding we are not intimating that the time-honored exception for children under 12 is unjustly discriminatory. Rather, we limit our holding solely to the question as it concerns special services available only to those between the ages of 12 and 22.

When the Board dismissed the petitioners' complaints against the youth tariff, it noted that the tariff raised an issue of unjust discrimination in that it was applicable only to a limited group. But it observed that the question of discrimination was merely one of degree, and concluded that limiting the tariff to those between the ages of 12 and 22 was reasonable and not arbitrary. It also found that it was necessary to limit the applicability of the tariff in order to preserve its promotional aspects because of the diversion from regular fare traffic which would otherwise

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[33] But see James C. Savory & Co. v. New York, C. & H. R.R., 2 I.C.C. 210 (1888) which sanctioned special rates for immigrants. In that case, however, the immigrants were under the care of a special New York State Commission on emigration, they were tieketed through the commission, traveled in special cars (some of which were sufficiently inferior to require remedial action by the ICC), and frequently went via special trains which returned to the point of origin empty. Accordingly, we find the case factually distinguishable, and inapposite.

result. Arguing that the question of unjust discrimination caused by a tariff limited in applicability on the basis of age is merely a question of degree does not aid in the analysis. All questions of discrimination under the Act are questions of degree as the statute only prohibits unjust discrimination. As indicated earlier, whether a discriminatory tariff is unjust is determined by whether the conditions and circumstances are substantially similar.

The Board here argues that extending reduced rates to those between the ages of 12 and 22 is justified as the classification corresponds to those who are still in school, frequently at great distances from home, and correspondingly in need of rapid transportation during the long holiday periods. The essential difficulty with this position is that it is predicated solely on the status of the traffic, and is unrelated to transportation. Further, it marks a radical departure from the Board's previous position as it has consistently held, to date, that students are not entitled to reduced rates merely because they are students. *Capital Group Student Fares,* 25 C.A.B. 280 (1957); *Caribair Student Standby Fares,* Order No. E-21667,[84] Jan. 12, 1965; *Field Trip Group Fare for School Children,* Order No. E19599, May 21, 1963. Finally, the argument is postulated on a factual assertion that is clearly contradicted by the record. The tariffs are not available during the peak holiday travel periods of Easter, Thanksgiving, Christmas, and New Years. These traditional holiday

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[84] In its order, dated 12 Jan. 1965, the Board stated:

"Special discount fares for students have come under the Board's scrutiny on two previous occasions. In Capital Group Student Fares, 25 CAB 280 (1957), a discount fare applicable to student groups of 25 or more was found to be unjustly discriminatory. The Board then pointed out in its opinion that 'Congress has manifested no intent to favor students in air transportation.' More recently, *Field Trip Group Fares for School Children* proposed by United Air Lines were ordered suspended by E-19599, May 21, 1963."

periods correspond generally to the long vacation periods afforded college students. Thus, during the period in which the Board argues the reduced rates are needed, they are not available. We are therefore forced to conclude that the orders of the Board dismissing the complaints not only can not be supported by these considerations dealing with the status of those eligible under the tariff, but are not supported by the arguments advanced by the Board.

Nor do we believe that requiring the tariff to be limited in order to preserve its promotional aspects lends added support to the orders here under review. This is little more than arguing that promotion is a valid consideration in determining whether a tariff is unjustly discriminatory. Limiting the class of persons eligible under the tariff is merely a means of securing that added factor in the ultimate determination. While the Board is charged with promoting the air transportation industry, it is doubtful, in view of the specific statutory language prohibiting unjust discrimination and undue preference and prejudice, that promotion alone is a sufficient justification for an otherwise unjustly discriminatory rate. Heretofore, the Board has consistently held that the promotional aspects of a tariff alone did not render the circumstances and conditions of service dissimilar. Thus, it has held that the discriminatory aspect of reduced rates to students, *Capital Group Student Fares, supra,* to freight forwarders, *International Airfreight Forwarders,* 27 C.A.B. 658 (1958), to groups of two or more traveling on a group excursion plan, *Group Excursion Fares,* 25 C.A.B. 41 (1957),[35] to travel agents and tour conductors, *Free & Reduced-Rate Transp.* Case, 14 C.A.B. 481 (1951); *ATC Resolution re Travel Agents & Tour Conductors,* 23 C.A.B. 1552, 29 C.A.B. 1344, 29 C.A.B. 1345, 31 C.A.B. 900 (1959), to teachers, *Frontier Airlines Reduced Fares for Teachers,* 38 C.A.B. 1148 (1963), to *U.N. Em-*

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[35] See also IATA Agreement, Rate & Traffic Matters, Order No. E-11988, Dec. 12, 1957.

ployees, Reduced Fares for U.N. Employees, Order No. E-19519, Apr. 23, 1963, and to men over 65 and women over 62, *Ozark Air Lines Senior Citizen Excursion Tariff,* Order No. E-21973, Mar. 31, 1965.[36] In those cases where the Board has found rate differentials not unjustly discriminatory, it has done so on the basis of transportation related factors and compensation, and not solely on the promotional aspects of the tariff. *Certificated Air Carrier Military-Tender Investigation, supra,* (reduced rates were justified by reduced cost and competition); *Capital Group Student Fares,* 26 C.A.B. 451 (1958)[37] (Reduced rates for groups of 25 and over justified on the basis of lower costs); *Deferred Airfreight Case,* 23 C.A.B. 651 (1956) (different rate for deferred freight which was available to any shipper who was willing to wait the extra delivery time); *Non-priority Mail Rate* Case, 34 C.A.B. 143 (1961) (reduced rates for the standby transportation of first-class mail).

Thus, on the basis of the Board's own analysis in prior decisions, these tariffs may not be justified on the ground of their promotional aspects alone. Since we have concluded that in the circumstances here present neither age nor factors relating to the status of the traffic may be considered in determining whether the circumstances and conditions of service are substantially similar, the validity of the Board's order rests on the promotional effect of these tariffs. While the Board appears to have rested its decision on all of these elements, we do not think the orders before us may be justified solely on the promotional aspects of the tariffs. For even though the question of unjust discrimination is one of fact for determination by the

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[36] The Board permitted a senior citizen tariff to go into effect in Mohawk Airlines Golden Age Excursion Tariff, Order E-17111, July 6, 1961, but ordered an investigation of the tariff because of the unjust discrimination caused by the tariff.

[37] Although titled student group fares, the tariff actually provided for reduced fares for any group of 25 or over irrespective of whether or not they were students.

Board, and while we recognize that the genius of the administrative practice is its adaptability and flexibility to the rapidly changing social and economic situation, see *American Trucking Ass'n.* v. *Atchison, T. & S.F. Ry.*, ... U.S. ...., 35 U.S.L.W. 4465 (May 29, 1967), we do not believe that such a radical change in policy can be justified without any evidentiary basis or rational justification. *City of Lawrence* v. *CAB*, 343 F.2d 583 (1 Cir. 1965).

Therefore, we set aside and reverse the orders of the Board in Cases No. 23,410, youth tariff, and 23,411, young adult tariff, and remand the cases to the Board for further proceedings not inconsistent with this opinion.[38]

V.

The petitioners finally assert that the tariffs in question are uneconomic and unreasonable in violation of § 404(b). They contend that the military standby tariff is uneconomic as it does not compensate the air carriers for the fully allocated costs of transportation. The Board held that while the tariff did not cover the fully allocated costs, it was not uneconomic because it met the profit impact test. That test essentially requires a fare to cover the out-of-pocket costs of carriage. Since the Board concluded that the air carriers were not scheduling on the basis of the military standby traffic, the tariff was not required to compensate the carriers for the fully allocated costs of transportation, but need only satisfy the profit-impact test. *Pittsburgh-Philadelphia No-Reservation Fares*, 34 C.A.B. 508 (1961). On the basis of the record before us, we can not say the Board abused its discretion in holding that the

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[38] We do not think that limiting the applicability of the tariffs for one year eliminates the error in these orders. The inadequacy of the orders stems from an improper consideration of factors not relevant, and from an unexplained departure from past practice. Whatever information may be gained from a year's experiment will not aid in the resolutions of the problems nor cure the defect.

military standby tariff was economic as it was within the zone of reasonableness. *Airfreight Rate Investigation-Directional Rates,* 11 C.A.B. 228 (1950); *Air Freight Rate Investigation,* 9 C.A.B. 340 (1948).

In view of the fact that we are remanding the youth and young adult fare tariffs for further proceedings, we do not deem it appropriate to reach the question of whether those tariffs are uneconomic and unreasonable. We believe that the interests of justice will be better served if the entire matter of the youth and young adult fare tariffs remain open for further consideration by the Board.

The order of the Board in Docket No. 22,791, et al, refusing to investigate or suspend the military standby tariff is affirmed. The orders of the Board in Docket Nos. 23,410 and 23,411 refusing to investigate or suspend the youth and young adult fare tariffs are set aside and reversed and the cases are remanded to the Civil Aeronautics Board for such further proceedings as are appropriate under the Federal Aviation Act of 1958 and not inconsistent with this opinion.

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

APPENDIX B

Order No. E-22186

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 20th day of May, 1965

Dockets 15845, 15925, 15973, 15983,
16000, 16025, 16026

Military standby fares proposed by

ALLEGHENY AIRLINES, INC.
AMERICAN AIRLINES, INC.
BRANIFF AIRWAYS, INC.
CENTRAL AIRLINES, INC.
CONTINENTAL AIR LINES, INC.
DELTA AIR LINES, INC.
EASTERN AIR LINES, INC.
FRONTIER AIRLINES, INC.
LAKE CENTRAL AIRLINES, INC.
NATIONAL AIRLINES, INC.
NORTH CENTRAL AIRLINES, INC.
NORTHEAST AIRLINES, INC.
NORTHWEST AIRLINES, INC.
OZARK AIR LINES, INC.
PACIFIC AIR LINES, INC.
PIEDMONT AVIATION, INC.
SOUTHERN AIRWAYS, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.
WESTERN AIR LINES, INC.

Order

The instant Order deals with the question of whether the Board should institute an investigation of the military standby tariffs of the 20 domestic trunkline and local service carriers listed in the above caption. A series of complaints has been filed by the National Trailways Bus System and its members (Trailways) requesting the Board to investigate and suspend these tariffs. The requests of Trailways for suspension have been denied in previous Board orders, but these orders deferred action on the requests for investigation in order to permit the Board to fully consider all the pleadings which have been filed in the subject dockets.[1]

The military standby tariffs became effective on various dates beginning in March 1963. These tariffs provide generally that military personnel on furlough, leave, or pass, or within seven days of discharge, may travel at reduced fares on a space-available or standby basis, subject further to removal at intermediate points en route to accommodate regular fare passengers. The military standby fares of the trunkline carriers are equivalent to approximately 50 percent of the jet coach fares, and those of the local service carriers approximately 50 percent of their regular first-class fares.

When these tariffs first became effective in 1963 they had expiration dates which the carriers have extended from time to time. The latest expiration dates of the subject tariffs were in April 1965, and the carriers filed tariff revisions which extended their applicability for either a fixed period of time, or in some instances indefinitely by cancellation of the expiry date. The complaints of Trailways are directed to these extensions of the military standby tariffs.

The seven complaints filed by Trailways against these 20 tariffs are substantially the same, and assert that the

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[1] Orders E-21845, February 26, 1965; E-22000, April 6, 1965; and E-22068, April 22, 1965.

military standby fares are unjustly discriminatory, unduly preferential and prejudicial, and unjust and unreasonable. The National Association of Motor Bus Owners has filed answers in support of the complaints in Dockets 16025 and 16026, alleging matters similar to those contained in the Trailways' complaints.

Answers requesting that the complaints be dismissed have been filed by 16 air carriers.[2] These answers generally assert that the Trailways' complaints are merely a repetition of complaints filed by certain air carriers over two years ago when the military standby fares were first proposed, and are in effect petitions for reconsideration of arguments which the Board has found to be without merit.[3] The air carriers support the military standby tariffs because they contend that these fares have been of economic benefit to the industry, and request the Board to affirm its 1963 findings that such tariffs are not unjustly discriminatory, unduly preferential or prejudicial, or unjust and unreasonable.

The Department of Defense has also filed answers in Dockets 16025 and 16026 opposing the Trailways' complaints. In its answers the Department sets forth the public interest factors which support continuance of the military standby fares.[4] Thus, the Department states that one of the most substantial advantages of this service is the morale factor of making it possible for the military

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[2] Allegheny, American, Braniff, Central, Continental, Delta, Eastern, Lake Central, North Central, Northwest, Ozark, Pacific, Piedmont, Southern, Trans World, and United.

[3] In Orders E-19376, March 14, 1963; E-19401, March 22, 1963; E-19535, April 29, 1963; and E-19605, May 23, 1963, the Board dismissed various air carriers' complaints against the original military standby tariffs.

[4] These public interest factors have been developed at greater length by the Department in the record of the New Bern and Jacksonville-Camp Lejeune Service Case, Docket 14560.

personnel who are separated from their families by many miles to return home periodically to visit. Other advantages cited are the time savings inherent in air transportation which permits more frequent travel and also greater length of time spent at furlough destinations; the promotional effect on air transportation generally by introducing many young servicemen to the experiences of air travel for the first time; and the safety factor which encourages many servicemen, who would otherwise travel by automobiles over great distances or hitch-hike to their destinations, to avoid the risks of the highway by utilizing the military standby fares.

As stated above, the Board has already acted on the Trailways complaints insofar as they request suspension, and has denied these requests.[5] Trailways has filed a petition for reconsideration of the Board's order denying its request for suspension of Allegheny's tariff, Order E-21845, February 26, 1965, asserting that the Board erred both in denying the request for suspension and in deferring decision on the request for investigation. The petition was moot when filed insofar as it relates to the suspension matter because Allegheny's tariff revision had already become effective prior to that date. In any event, the petition presents no basis for concluding that the Board erred in denying the requests for suspension.

With respect to the deferral question, Trailways asserts that the grounds for deferral of Board action upon Trailways' request for investigation were insufficient as a matter of law, because they rely upon prospective pleadings which may be filed in other tariff matters. Since the Board will now consider the investigation question, the petition for reconsideration of the deferral has become moot. Furthermore, we adhere to the view that the questions raised by the various complaints relate to an industry matter and may properly be determined together, giving due considera-

[5] See footnote 1, *supra*.

tion to any matters which are alleged to be peculiar to individual carriers. Accordingly, the petition for reconsideration of Order E-21845 will be dismissed.

We turn now to the question of investigation. The arguments set forth in the various complaints relating to unjust discrimination and undue preference and prejudice do not, in the Board's opinion, state facts which warrant an investigation. The Board thoroughly considered similar arguments in 1963 when it first permitted these tariffs to become effective,[6] and we adhere to the conclusions reached in our prior orders. Specifically, we reaffirm our finding that the military standby service is substantially dissimilar from the regular fare service in that it is provided on a standby or space-available basis, and the military traffic may be "bumped" en route by regular fare passengers. While Trailways asserts that the space-available restriction is meaningless, referring to route segment or, more often, system average load factors of the individual carriers, such argument ignores the fact that airline traffic does not move in a constant flow. Some flights, times of day, and days of week are more popular for air travel than others, and during such peak periods of travel the carriers may be unable to accommodate the military standby passenger or he may be compelled to relinquish his seat en route. This disadvantage is not reflected by average route or route segment load factors, and certainly references to system load factors are too remote to bear on this point.

Since we have found that the military standby service is substantially dissimilar from the regular fare service, the element of discrimination is basically confined to the question of whether the carriers may lawfully provide this standby service to the military and not to civilian traffic. Trailways argues that this feature of the service renders the tariff unjustly discriminatory *per se*. Thus, Trailways

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[6] See footnote 3, *supra*.

states that a fare reduction to a category of traffic solely on the basis of identity and mission is unlawful unless specifically permitted by section 403(b) of the Act, and section 403(b) does not include military traffic within the categories which may receive free or reduced-rate transportation.

It is true that the Board will ordinarily disapprove fares based on the identity of the traffic not included within the exceptions of section 403(b) of the Act. For example, in the past the Board has disapproved special fares for teachers and students.[7] We reaffirm our prior actions and will continue to disapprove special fares based upon identity of traffic unless the most compelling circumstances dictate a different result. However, we do not accept Trailways' contention that all special fares based upon identity are unjustly discriminatory *per se* unless specifically permitted under section 403(b) of the Act. Whether a particular discrimination is unjust is a question to be determined after consideration of all relevant matters,[8] and a particular discrimination based upon identity may be justified by compelling circumstances even though it is not specifically permitted under section 403(b). The Board's view that special fares to the military may be lawful even though not specifically permitted under our Act appears to be consistent with the history of military fares in surface transportation. Thus, although the Interstate Commerce Act now contains provisions which specifically permit the use of reduced fares for the military,[9] prior to the enactment of these provisions in 1944 reduced fares for the military were in effect for surface transportation.

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[7] Frontier Teachers Tariff, Order E-20436, February 4, 1964; Capital Group Student Fares, 25 C.A.B. 280 (1957).

[8] Military Tender Investigation, 28 C.A.B. 902, 924 (1959).

[9] 49 U.S.C., sections 22(1) and 217(b).

We now turn to the question of whether any compelling circumstances exist which may justify the discrimination inherent in the military standby tariffs. The Board reaffirms its 1963 findings that the military standby fares are not unjustly discriminatory because of (1) considerations of national interest, including the morale factor in permitting rapid transportation to be available to servicemen on leave at a price within their reach, and (2) the competitive problem wherein surface carriers provide transportation to military personnel at fares below those which are available to civilian traffic. While Trailways asserts in effect that the Board may not rely upon the national interest and competitive considerations in justifying an otherwise discriminatory fare, the Board views the Act and its authority thereunder differently, and we will continue to follow our prior interpretation of the Act[10] in our disposition of the instant complaints.

The public interest considerations which tend to justify the military standby fares have been summarized by the answer of the Department of Defense, *supra*, and need not be repeated. The competitive considerations which tend to justify the military standby fares are the facts that both the railroads and bus lines offer reduced fares to military personnel on furlough. If the air carriers are prohibited from offering the military standby fares they will be at a gross competitive disadvantage vis-a-vis the surface common carriers, as well as with the private automobile, in the transportation of military personnel. It should be noted that even with the military standby fares the air fares are at a higher level than the surface furlough fares, and the surface fares are not restricted by standby or space-available provisions.

Trailways further asserts that the military standby tariffs of certain air carriers are unlawful because the

[10] Tour Basing Fares, 14 C.A.B. 257, 258 (1951); Order E-19376, March 14, 1963.

fares are only available in selected markets and not over these carriers' entire systems. Most carriers do in fact offer the military standby fares on a system-wide basis. However, the carriers may, consistent with the Act, offer special fares in certain markets and not in others. Factors which may influence a carrier's decision to limit these fares to certain markets are traffic demand and competition. Indeed, the surface carriers likewise do not offer furlough fares on a system-wide basis. The Board is not aware that any military personnel or communities have been prejudiced by air carrier market selectivity. Until such injury has been asserted there is no basis to investigate those few tariffs which are not offered system-wide.

Nor do the various differences which exist between the individual carriers' tariffs constitute matters which in our opinion warrant investigation. While uniformity among carrier tariffs is not required, the military standby tariffs of all carriers are in fact essentially similar. The differences which are set forth in the Trailways complaints relate to the minutes of the tariffs, are well within management prerogative, and do not warrant investigation.

The question remains whether the Board should institute an investigation to determine whether the military standby fares are just and reasonable at the current level of approximately 50 percent of standard fares. As Trailways states in its complaints, the Board has adopted two standards for assessing the reasonableness of tariffs; the fare-cost test and the profit impact test. None of the air carriers has attempted to justify these fares on the basis of the fare-cost test, which is a comparison of the fare level with the fully-allocated cost of service, and we will assume that the military standby fares do not meet that test. Indeed, we would not expect a fare for standby service to meet the fully-allocated costs of service where, as here, capacity is not geared to the standby traffic. In this regard we distinguish the Board's decision in *Pittsburgh-*

Philadelphia No-Reservation Fare Investigation, 34 C.A.B. 508 (1961), which held that the reasonableness of an Allegheny fare for a no-reservation service must be determined on the basis of fully-allocated costs. The Board found in that case that approximately 40 percent of the traffic consisted of non-reservation fare passengers, and that Allegheny had in fact geared its capacity to both its regular class of service and its no-reservation service. However, in the instant matter there is no reasonable basis to conclude that the carriers are gearing capacity to the military standby traffic, and the carriers assert in their answers that they do not do so.

Traffic data contained in the carriers' answers indicate that the military standby traffic represents approximately five percent of total traffic and less than three percent of passenger revenues. It strains credulity to assume that the carriers would gear their capacity to such small portion of total traffic, carried at one-half the regular fare. While the complaints contain an oblique contention that the carriers may be gearing capacity to military standby traffic by continuing in effect a flight which is poorly patronized by regular traffic and which would otherwise be discontinued, or by adding additional schedules on the basis of regular fare and military fare traffic, the mere allegation that such practice is possible does not afford a basis for instituting a major investigation of the industry-wide military standby fares.[11] Indeed, rather than suggesting that the carriers are gearing capacity to military standby traffic, the information before us indicates that these fares are, in fact, accomplishing their purpose of enabling the carriers to

[11] Even if it be assumed that there are isolated instances where carriers are adding flights or continuing present schedules in part because of the patronage of military standby traffic, and if we could pinpoint these few isolated cases, this fact would not require use of the fully-allocated cost test in measuring the reasonableness of these fares because of their industry-wide basis of application.

obtain more efficient utilization of existing capacity by filling seats which would otherwise remain empty.

A second standard for measuring discounted or promotional fares is the profit-impact test. This is the standard customarily applied to fares for services offered on a space-available basis (such as the subject military furlough fares), where the carrier's available capacity is geared to the regular full-fare traffic. Under this standard a fare not reasonably related to the cost of the service may still be termed reasonable if it improves the net profit position of the carrier. To satisfy the profit-impact test a promotional fare must produce sufficient new traffic to offset the loss of revenue from self-diversion plus the added cost of carrying the additional traffic. Although only a few of the carriers' answers contain estimates of self-diversion and generation, all of the answers contend that the military standby tariffs have improved the operating results of the carriers. In the absence of some indication to the contrary, it is reasonable to assume that the industry would not urge the continuance of this program unless, as corporations operated with a profit motive, it was to their economic advantage to do so. American's answer does contain an estimate of its revenues, diversion added costs and net profit from military standby fares during 1964. This estimate clearly demonstrates that these fares were profitable to American, resulting in a net profit of over $2,350,000 after allowance for self-diversion and added costs. If American's experience is typical of that of the rest of the industry, the military standby fares contributed over $13 million to the industry's net profit in 1964.

With regard to the subsidized local service carriers, Trailways asserts that no analysis has been presented to indicate whether the subsidy burden has been increased or decreased by the military standby fares. The answers of the local service carriers indicate to us that this program has improved the operating results of the subsidized

carriers as well as those of the other carriers. For example, Lake Central asserts that the revenues it received from the military standby fares in 1964 amounted to $105,294, which is equivalent to 56 percent of Lake Central's 1964 net income.[12] The carrier estimates self-diversion at a maximum of 15 percent. On this basis, the carrier's military standby fares resulted in net additional revenues of approximately $75,000 during 1964. Since the added costs are minimal, it is evident that most of the net additional revenues represent profit to the carrier and hence a reduction of its subsidy requirements. The answers filed by the other local service carriers also indicate that these fares have resulted in net additional revenues to them. Under these circumstances, the Board does not believe that the subsidized nature of this group of carriers requires that their military standby fares be treated differently from those of the non-subsidized carriers.

In its answer Eastern states that, although the Trailways request for investigation should be denied, if the Board does decide to institute an investigation the reasonableness of the level of the present military standby reduction of 50 percent should be in issue. Eastern believes that the fare reduction should be smaller than 50 percent. While the carriers are free to propose an increase in these fares if they wish, the question we must consider here in determining whether to institute an investigation of the reasonableness of the military standby fares is whether the current fares appear to be unlawfully low. If these fares fall within the zone of reasonableness at their present level, no purpose would be served by investigating the range of the zone of reasonableness and issuing an advisory opinion thereon. Under our Act, the Board may only prescribe fares after finding that the effective fares are unlawful.

As has been set forth above, the present fares appear to meet the profit-impact test of reasonableness. In addition,

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[12] Lake Central's Form 41's indicate that the carrier had gross operating revenues of $8,045,000 during calendar year 1964.

we conclude that the percentage discount from regular fares does not indicate that the present level is unreasonably low. There are many instances in the past where the Board has permitted special fares and rates at a level equivalent to one-half the standard fares and rates. For example, the youth fares, family fares, and "golden age" fares have been at the level of 50 percent of regular fares. Likewise, children's fares, and standby clergy fares are presently one-half of the regular fares. In the area of mail and cargo rates, the Board has prescribed nonpriority mail rates for mail carried on a space-available basis at a level equivalent to 50 percent of the regular air mail rates,[13] and has established minimum rates for deferred air freight applicable to property carried on a space-available basis at levels of 55 percent (eastbound) and 65 percent (westbound) of the prescribed minimum general commodity rates.[14] In conclusion, since the effective military standby fares cover added costs, make a substantial contribution to other costs of the carriers, and satisfy the profit-impact test, these fares appear *prima facie* just and reasonable, and the Board will not undertake an investigation of the reasonableness of these fares.

The Board has considered all the other matters raised in the complaints and is of the opinion that the complaints individually, and as a group, do not state facts which warrant an investigation, and the complaints will therefore be dismissed.

Accordingly, pursuant to the Federal Aviation Act of 1958, and particularly sections 204(a) and 1002 thereof,

IT IS ORDERED THAT:

1. The requests of the National Trailways Bus System and its members (Trailways) for investigation in Dockets

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[13] Nonpriority Mail Rate Case, 34 C.A.B. 143 (1961).

[14] Deferred Airfreight Case, 23 C.A.B. 651 (1956).

15845, 15925, 15973, 15983, 16000, 16025, and 16026, are denied, and the complaints of Trailways in these seven dockets are dismissed.

2. The petition of Trailways for reconsideration of Order E-21845, February 26, 1965, is dismissed.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

APPENDIX C

The relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 31, 49 U.S.C. 1301 *et seq.*) are:

TITLE I—GENERAL PROVISIONS

DEFINITIONS

Sec. 101 [72 Stat. 737, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires—

* * * * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States; and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or or partly by aircraft and partly by other forms of transportation.

* * * * *

DECLARATION OF POLICY: THE BOARD

Sec. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act,

the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * *

TITLE IV—AIR CARRIER ECONOMIC REGULATION

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Tariffs of Air Carriers

Filing of Tariffs Required

Sec. 403. [72 Stat. 758, as amended by 74 Stat. 445, 49 U.S.C. 1373] (a) Every air carrier and every foreign

air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

Observance of Tariffs; Rebating Prohibited

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and

conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis.

Notice of Tariff Change

(c) No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public

interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

Filing of Divisions of Rates and Charges Required

(d) Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates.

RATES FOR CARRIAGE OF PERSONS AND PROPERTY

Carrier's Duty to Provide Service, Rates, and Divisions

Sec. 404. [72 Stat. 760, 49 U.S.C. 1374] (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Discrimination

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or de-

scription of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * * *

TITLE X—PROCEDURE

* * * * *

Complaints to and Investigations by the Administrator and the Board

Filing of Complaints Authorized

Sec. 1002. [72 Stat. 788, 49 U.S.C. 1482] (a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his official duties, the Administrator or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary shall, within ninety days after receiving such a complaint, inform the Administrator or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary action taken.

* * * * *

Power to Prescribe Rates and Practices of Air Carriers

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided,* That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge.

Rule of Ratemaking

(e) In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

* * * * *

Suspension of Rates

(g) Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare,

charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: *Provided,* That this subsection shall not apply to any initial tariff filed by any air carrier.

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 39 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

The relevant provisions of the Interstate Commerce Act (49 U.S.C. 1, *et seq.*) are:

CHAPTER 1—INTERSTATE COMMERCE ACT, PART I; GENERAL PROVISIONS AND RAILROAD AND PIPE LINE CARRIERS

* * * * *

Special Rates and Rebates Prohibited

Sec. 2 [24 Stat. 379 (as amended by 41 Stat. 479, 48 Stat. 1102, 49 Stat. 543), 49 U.S.C. 2] If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

* * * * *

Restrictions; quotations of rates for United States Government

Sec. 22 [25 Stat. 862 (as amended by 25 Stat. 862, 28 Stat. 643, 43 Stat. 827, 44 Stat. 1247, 44 Stat. 1446, 48 Stat. 1264, 49 Stat. 543, 50 Stat. 475, 50 Stat. 809, 54 Stat. 900, 901, 58 Stat. 751, 70 Stat. 702, 71 Stat. 564, 72 Stat. 1264); 49 U.S.C. 22] (1) Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free

carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this chapter shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of Veterans' Administration facilities or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this chapter shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 of this title reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at their own expense to their homes or other prospective places of abode; nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the free carriage, storage, or handling by a carrier of the household goods and other personal effects of its own officers or employees when such goods and effects must necessarily be moved from one place to another as a result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this chapter

contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; nothing in this chapter shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose or from carrying a disabled person accompanied by an attendant if such person is disabled to the extent of requiring such attendant, at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier: * * *

(2) All quotations or tenders of rates, fares or charges under paragraph (1) of this section for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates for the United States Government, or any agency or department thereof, including quotations or tenders for retroactive application whether negotiated or renegotiated after the services have been performed, shall be in writing or confirmed in writing and a copy or copies thereof shall be submitted to the Commission by the carrier or carriers offering such tenders or quotations in the manner specified by the Commission and only upon the submittal of such a quotation or tender made pursuant to an agreement approved by the Commission under section 5b of this title shall the provisions of paragraph (9) of said section 5b apply, but said provisions shall continue to apply as to any agreement so approved by the Commission under which any such quotation or tender (a) was made prior to August 31, 1957 or (b) is on or after August 31, 1957 made and for security reasons, as hereinafter provided, is not submitted to the Commission: * * *

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 818

TRANSCONTINENTAL BUS SYSTEM, INC., ET AL.,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 383 F. 2d 466. The findings and order of the Civil Aeronautics Board (Pet. App. 45a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1967. On October 13, 1967, the time for filing a petition for writ of certiorari was extended to November 14, 1967, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Civil Aeronautics Board abused its discretion in dismissing without a hearing complaints against air carrier tariffs providing for reduced military standby fares after it found that the fares were justified by competitive considerations and the needs of the national defense.

STATUTE INVOLVED

The relevant provisions of the Federal Aviation Act (72 Stat. 731, 49 U.S.C. 1301, *et seq.*) are set forth in Appendix to the petition.

STATEMENT

In 1963 the Civil Aeronautics Board approved, on an experimental basis, "military standby tariffs" filed by twenty scheduled air carriers. Under the tariffs, military personnel on leave, pass, or furlough, or within seven days of discharge, will be carried at half jet coach or single class fare if empty seats remain after all regular fare passengers are aboard, but they may be "bumped" en route to accommodate a regular fare passenger. When the air carriers filed extensions of these tariffs in 1965, petitioners, a national trade association of motor bus operators and affiliated bus companies, filed complaints seeking suspension and investigation of the tariffs. Answers requesting that the complaints be dismissed were filed by 16 air carriers and the Department of Defense. On the basis of the pleadings, the Board found that the complaints did not state facts which warranted an

investigation and dismissed the complaints without a hearing.[1]

The principal issue raised by petitioners' complaints was whether the offering of reduced standby fares to military personnel and not to civilian passengers constituted unjust discrimination prohibited by Section 404(b) of the Federal Aviation Act.[2] Petitioners argued that the tariffs were unlawful *per se* because they discriminated in favor of a category of persons not specifically listed in Section 403(b), which permits carriers to offer free or reduced-rate transportation to certain named categories of persons (mostly persons having some connection with the carrier). The Board rejected petitioners' argument, stating that "[w]hether a particular discrimination is unjust is a question to be determined after consideration of all relevant matters and a particular discrimination based upon identity may be justified by compelling circumstances" even though the favored traffic is not among the categories listed in Section 403(b) (Pet. App. 50a).

---

[1] Section 1002(a) of the Federal Aviation Act (49 U.S.C. 1482(a)) provides in pertinent part: "Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing."

[2] Section 404(b) (49 U.S.C. 1374(b)) provides:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Board held that any discrimination inherent in the military standby fares was justified by considerations relating to the national defense and the competitive position of the air carriers (Pet. App. 50a). The Board relied upon the assertion of the Secretary of the Army that the standby fares contribute significantly to the national defense by improving the morale of servicemen, who are able to visit their families more frequently and at greater length than would be possible using surface transportation, and by reducing the safety hazards of hitchhiking and long-distance driving (Pet. App. 47a–48a). Noting that both the railroads and the bus lines offer reduced fares to military personnel on furlough, the Board found that the air carriers would be at a "gross competitive disadvantage vis-a-vis the surface common carriers" in the transportation of military personnel if they were prohibited from offering the standby fares. "[E]ven with the military standby fares," the Board pointed out, "air fares are at a higher level than the surface furlough fares, and the surface fares are not restricted by standby or space-available provisions" (Pet. App. 51a).

The Board also rejected petitioners' argument that the half-fare standby tariffs were not "just and reasonable" fares required by Section 404(a). The Board found that the tariffs met the "profit-impact" test of reasonableness, customarily applied to standby services, in that the revenues covered the carriers' out-of-pocket costs (Pet. App. 52a–56a).

On petition for review, the court of appeals held that the Board had not abused its discretion in dis-

missing the complaints without a hearing. The court agreed with the Board's conclusion that the Act does not prohibit reduced rates for classes of persons not enumerated in Section 403(b), provided those rates are not unjustly discriminatory (Pet. App. 18a–24a). The court held that the Board must consider the public interest factors set out in the statute's declaration of policy (Section 102) and rule of ratemaking (Section 1002(e)) and that under these provisions "[b]oth competition and adapting the air transportation industry to the needs of national defense are considerations which may validly be weighed by the Board in determining whether a tariff is unjustly discriminatory" (Pet. App. 30a–31a, 36a).

ARGUMENT

Petitioners' contentions, taken as a whole, raise two basic questions: whether allowing reduced fares for a category of persons not listed in Section 403(b) is unjustly discriminatory *per se*, and whether the Board was precluded from considering the interests of competition and the national defense in determining whether the military standby tariffs were unjustly discriminatory. The court below correctly answered both these questions in the negative, and its decision is not in conflict with any other judicial or administrative decisions. There is no occasion for further review by this Court.[3]

[3] The court below reversed and remanded the Board's dismissal of complaints challenging reduced fare tariffs for students and young adults. We have not petitioned for certiorari to review that ruling.

1. The court below held that Section 403(b) "merely permits the granting of reduced-rate transportation to the classes of persons in the section without regard to whether such rates meet the requirements of § 404(b), and does not preclude the giving of discriminatory rates in a proper case to other classes of persons" (Pet. App. 24a). See *Flying Tiger Line* v. *Civil Aeronautics Board*, 350 F. 2d 462, 465–466 (C.A.D.C.). This view is in accord with this Court's construction of Section 22 of the Interstate Commerce Act (49 U.S.C. 22) which, like Section 403(b), permits the granting of reduced rate transportation to enumerated categories of persons:

> The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust.[4]

Petitioners emphasize the fact that in 1960 Congress considered, but failed to pass, legislation which

[4] *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U.S. 263, 278. See also, *Nashville, C. & St. L. Ry.* v. *Tennessee*, 262 U.S. 318, 323. Although it was not until 1944 that Section 22 of the Interstate Commerce Act was amended to include military furlough traffic, the Commission had approved reduced rates for such traffic for several years prior thereto. As the court below pointed out, the amendment was designed simply "to insure the continuance of such transportation by precluding any determination that the reduced rates" were unjustly discriminatory (Pet. App. 23a).

would have amended Section 403(b) to include military personnel among those to whom carriers could grant reduced-rate transportation (Pet. 23–24, 29–30). In view of the Board's consistent rulings that Section 403(b) is not an exclusive list of persons to whom reduced rate transportation may be offered, the failure of Congress to include military personnel in Section 403(b) merely reflects a decision that discrimination in favor of this class of traffic should continue to be subject to the Board's substantive review under Section 404(b).[5] No inference that an agency lacks the authority requested from Congress can be drawn from the fact that it sought an amendment which would terminate or avoid adverse contentions and litigation.

[5] As the court below pointed out (Pet. App. 21a–22a), the Board has consistently held that Section 403(b) is not an exclusive list of persons to whom reduced rate transportation can be afforded (*e.g.*, *Airline Pass Agreement* 1 C.A.A. 677; *ATC Resolutions Re Travel Agents and Tour Conductors*, 31 C.A.B. 991). Petitioners cite Orders E–14349 (29 C.A.B. 1344) (Pet. 22) and E–25757 (Pet. 23) as Board pronouncements that reduced rates may not be granted to classes of traffic other than those listed in Section 403(b). As the court below (Pet. App. 22a) noted, however, Order E–14349 was a preliminary order, and the intimation that Section 403(b) is exclusive was repudiated by subsequent orders in the same proceeding, *ATC Resolutions Re Travel Agents and Tour Conductors*, 30 C.A.B. 1552; 31 C.A.B. 991. In Order E–25757, the Board's statement relied upon by petitioners, that "Section 403(b) * * * specifically authorizes the Board, *by regulation*, to permit free or reduced rate transportation to others than those enumerated in the Act with respect to overseas or foreign air transportation, but does not grant similar authority to interstate air transportation" (emphasis added), in no way detracts from its consistent decisions that other classes of traffic may be granted free or reduced rate transportation provided the discrimination is not unjust under Section 404(b).

United States v. *Capital Transit Co.*, 325 U.S. 357, 362.

Petitioners argue that the Board's consideration of these factors is inconsistent with this Court's decision in *Delta Air Lines* v. *Summerfield*, 347 U.S. 74. In that case, however, the Court held that the meaning of the statutory provision in question was so clear that the policies set out in Section 102 could not be utilized to produce a different meaning. In the present case, the meaning of "unjust discrimination" cannot properly be determined without reference to the basic policies of the Act. The court below held that the rule of equality was paramount but that the discriminatory fares were justified by considerations which Congress and this Court have deemed relevant to the Board's determination. The weight to be given to the various factors depends upon the particular facts of each case and is a matter for the agency's determination. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344. As set forth in the statement, *supra*, there was ample support for the Board's assessment of the importance of the national defense and competitive factors.[8]

[8] Petitioners suggest that "[u]nder the competitive theory espoused by the Board, no potentially profitable fare discount, irrespective of its discriminatory characteristics, would be barred", and they purport to see the day when "the airlines can, with the Board's encouragement, selectively divert those markets comprising the principal sources of Petitioners' passenger revenues" (Pet. pp. 17–18). The competitive factor was only one of the factors entering into the Board's determination and it by no means follows that, in other factual contexts, it would lead the Board to the same result. In *American Trucking Assns.* v. *F.C.C.*, *supra*, the Commission determined that there was insufficient competitive necessity to justify certain discrim-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
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ROBERT L. TOOMEY,
BURTON S. KOLKO,
Attorneys,
Civil Aeronautics Board.

JANUARY 1968.

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inatory rates, and at the same time ruled that other similar discriminatory rates were justified on this basis. The court approved, noting that this Court had held in *Eastern-Central* that the factors which should predominate under the particular circumstances was a choice for the Commission to make.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT, U. S.

FILED

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 818

TRANSCONTINENTAL BUS SYSTEM, INC., ET AL.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS BY THE NATIONAL ASSOCIATION OF MOTOR BUS OWNERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

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TRANSCONTINENTAL BUS SYSTEM, INC., ET AL.,
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CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS BY THE NATIONAL ASSOCIATION OF MOTOR BUS OWNERS

The National Association of Motor Bus Owners with the consent of petitioners and respondent (See Appendix) joins with the Petitioner in requesting that the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted in the above-captioned case.

INTEREST

1. The National Association of Motor Bus Owners is a nonprofit corporation, organized and existing under the laws of the District of Columbia with its principal office at 839 17th Street, N.W., Washington, D. C. It is the national association for the intercity motor bus industry and its membership includes the Greyhound system and the National Trailways system of bus operators. It represents approximately 1,000 motor bus carriers which collectively conduct operations throughout the United States. Its members are actively engaged in the transportation of passengers and package express by motor bus under the jurisdiction and regulation of the Interstate Commerce Commission.

2. As an authorized representative of surface transportation in the motor carrier industry, the National Association of Motor Bus Owners has a distinct and unique interest in this case.

ARGUMENT

The National Association of Motor Bus Owners hereby incorporates and supports the Petition for a Writ of Certiorari filed by the Petitioners, Trans-Continental Bus System, Inc. et al., for the reasons therein set out.

CONCLUSION

For the foregoing reasons it is submitted that the Court should grant the Petitioners' Writ of Certiorari.

Respectfully submitted,

FREDERICK S. HILL

APPENDIX

LAW OFFICES
BOBOS & LESTER
BENDER BUILDING
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WASHINGTON, D. C. 20036

December 20, 1967

George C. Cochran, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Dear Mr. Cochran:

On behalf of Transcontinental Bus Systems, Inc., we are writing to confirm that we have long been interested in having the support of NAMBO, and in this regard welcome your suggestion that you file a Brief Amicus in *Transcontinental Bus Systems, Inc.* v. *Civil Aeronautics Board* before the Supreme Court.

Sincerely,

ROBERT C. LESTER
Robert C. Lester

cc: Warren Goff, Esq.

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

December 13, 1967

George C. Cochran, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Re: Transcontinental Bus Systems, Inc.
v. Civil Aeronautics Board (No. 818)

Dear Mr. Cochran:

In reply to your letter of December 13, 1967, I am pleased to advise you that the United States consents to your filing a brief *amicus curiae* in the above-captioned case on behalf of the National Association of Motor Bus Owners.

Very truly yours,

ERWIN N. GRISWOLD
Erwin N. Griswold
Solicitor General